UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREE SPEECH, by its Member GREG RUGGIERO; STEAL THIS RADIO; DJ THOMAS PAINE; DJ CARLOS RISING; DJ SHARIN; DJ.E.S.E.; FRANK MORALES; and JOAN MUSSEY,	:	
Plaintiffs,	:	
- against -	:	98 Civ. 2680 (MBM)
JANET RENO, as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; and the FEDERAL COMMUNICATIONS COMMISSION,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

Plaintiffs Free Speech, Steal This Radio, DJ Thomas Paine, DJ Carlos Rising, DJ Sharin, DJ.E.S.E., Frank Morales, and Joan Mussey, respectfully submit this memorandum of law in support of their motion for a preliminary injunction.

Plaintiffs bring this action in order to vindicate their First Amendment right to speak over the electromagnetic spectrum dedicated to radio broadcasting--an electronic public forum of virtually unlimited character--and their right to hear the political, educational, and cultural information broadcast over this forum for the diverse community in which they live.

Plaintiffs are people and organizations engaged in and listening to "microradio" (low-power radio) broadcasting in New York City ("City"). Plaintiff Free Speech is an unincorporated association of persons who have joined together to foster the development of microradio stations in the City. Plaintiff Steal This Radio is an unincorporated association of persons who have collectively operated a microradio station on the City's Lower East Side since November 1995, providing an important outlet for individuals and groups in that community to share their views and disseminate local news and information. Broadcasting every evening at 88.7 megahertz on the FM dial with only 20 watts of power, Steal This Radio has developed a significant listening audience among Lower East Side residents and community groups who tune in to the station because it is the only City station which provides local news and information on events of relevance to their daily lives. Plaintiffs DJ Chrome, DJ Thomas Paine, DJ Sharin, and DJ.E.S.E. all either produce or present programming that is broadcast over Steal This Radio, and wish to continue their expressive activities on the broadcast radio spectrum. Plaintiffs Frank Morales and Joan Mussey listen to the broadcasts of Steal This Radio, and are participating in this case in order to assert their First Amendment rights to continue to receive the information broadcast by Steal This Radio.

Even though plaintiffs lack broadcast licenses from the Federal Communications Commission ("FCC"), they do not regard themselves as radio "pirates." Instead, they claim a First Amendment right to speak over the electromagnetic spectrum dedicated to radio broadcasting--an electronic public forum of virtually unlimited character--subject only to reasonable time, place and manner regulations that are even-handedly applied to all broadcasters, full-power and low-power alike. Plaintiffs maintain that the present regulatory scheme for radio broadcasting, codified in Title III of the Communications Act of 1934 (the "Act"), as amended, 47 U.S.C. §§ 301 et seq., on its face and as applied to microradio stations, violates their right to freedom of speech under the First Amendment to the United States Constitution.

Plaintiffs seek declaratory relief holding the Act to be unconstitutional to the extent that it requires microradio stations to first obtain broadcast licenses from the Federal Communications Commission ("FCC") before they can broadcast, even though the license requirement burdens substantially more speech than necessary to serve the government's interest in preventing signal interference and ensuring public safety, and suppresses a large amount of protected expression.

Plaintiffs also allege that the broadcast regulatory scheme violates the First Amendment because it gives the FCC virtually unfettered discretion to decide who broadcasts (and who must remain silent) in this electronic public forum and under what conditions, permits the agency to tax the exercise of First Amendment rights, and authorizes it to seize microradio stations' broadcasting equipment without the procedural safeguards constitutionally mandated to minimize the risk of prior restraints on protected expression and prevent unreasonable searches and seizures.

Plaintiffs further allege that the current regulatory scheme authorizes the FCC to grant broadcast licenses to use exclusively assigned frequencies to a relatively few broadcast radio stations which are collectively owned by even fewer media companies, and therefore enables a select group of favored speakers to monopolize the electronic public forum.

Finally, plaintiffs seek declaratory relief holding that the FCC's present enforcement policies and practices in regard to unlicenced microradio stations violate their rights under the First, Fourth, and Fifth Amendments and Section 312 of the Act. 47 U.S.C. § 312.

In aid of their constitutional rights, plaintiffs seek injunctive relief enjoining the government from civilly and criminally prosecuting them for their microradio broadcasting activities, closing their microradio stations, confiscating their broadcasting equipment, and otherwise interfering with their microradio broadcasts.

STATEMENT OF THE CASE

The Medium of Radio

Although radio is sometimes described as the "forgotten medium," it remains a vitally important and powerful medium today, largely because of its pervasiveness and portability. There are nearly one billion radios in the United States, with nearly every home having at least one radio and nearly every automobile equipped with a radio. Ninety-five percent of all persons over 12 years of age listen daily to the radio in or outside of the home. Because radio is uniquely pervasive and portable, it reaches many persons who lack access to other electronic mass media, including those who cannot afford to subscribe to cable television service, own a personal computer, or access the Internet. Radio is thus vitally important to the economically disadvantaged in society, including the homeless, who rely solely on this medium for critical news and information. While perhaps not advertiser-friendly, these constituencies are at least part of the audience to which microradio stations such as Steal This Radio target programming. See Affidavit of Lawrence C. Solely ("Solely Aff.") ¶¶ 3-8, 55. See also M. Keith, The Radio Station 1 (4th ed. 1997); Radio: The Forgotten Medium xi, 35 (E. Pease & E. Dennis ed. 1997).

The Evolution of Radio Broadcasting Regulation

Radio technology was first used for ship-to-ship and ship-to-shore communications. S. Douglas, Inventing American Broadcasting: 1899-1922 234 (1987). Between 1907 and 1912, however, literally hundreds of "amateurs" began operating wireless stations in communities all across the United States, creating an informal network of communications for persons to share their views with distant speakers and listeners. Id. at 187-207. The proliferation of amateur stations soon prompted concerns about potential interference with naval and commercial wireless operations -- concerns that only intensified with charges (uncorroborated) that amateur stations had interfered with ship-to-shore communications and transmitted false reports on the safety of passengers during the Titanic disaster in April 1912. Id. at 233.

Four months later, in August 1912, Congress enacted the Radio Act of 1912. Pub. L. No. 62-264, 37 Stat. 302 (1912). The 1912 Radio Act required all wireless operators, including amateurs, to secure licenses from the Secretary of Commerce. Applicants were required to specify the exact wavelengths at which they proposed to operate. Certain wavelengths were reserved for use by the United States Navy, while others were allocated for commercial wireless stations, and still others were set aside for amateur stations. Douglas, supra, at 234. In theory, anyone could apply for a license to operate a wireless station, and, in theory, the Secretary of Commerce was obligated to issue such license. National Broadcasting Co. v. United States, 319 U.S. 190, 212, 63 S. Ct. 997, 1007 (1943) ("NBC v. United States").

Despite the inferior spectrum allocation and the new license requirement, amateurs continued to dominate the airwaves. By early 1917, there were almost 14,000 licensed amateur stations, roughly twice the number of licensed commercial stations. When the United States declared war on Germany in April 1917, all amateur stations were ordered to cease operations. Those which refused to sign off were forcibly closed down. In the first ten days of April 1917 alone, the New York City Police Department confiscated equipment from 800 amateur stations. Following the November 1918 Armistice, amateur stations were allowed to resume operations, and by late 1919, they were again dominating the airwaves. Douglas, supra, at 292-99 (1987).

The first broadcast radio stations were established in the early 1920's. The number of stations grew rapidly; by 1926, there were nearly 600 licensed stations. NBC v. United States, 319 U.S. at 211, 63 S. Ct. at 1007.

The new mass medium was not, however, an exclusively commercial domain, as many noncommercial broadcast radio stations were operated by colleges, universities, churches, and labor unions. Indeed, the premiere issue of Radio Broadcast heralded broadcast radio as "the people's university," with the potential to make government "a living thing to its citizens." R. McChesney, Telecommunications, Mass Media, and Democracy 14 (1993).

Alarmed by the growing interference among broadcast radio stations, Secretary of Commerce Herbert Hoover convened a series of radio conferences to address the problem. NBC v. United States, 319 U.S. at 211, 63 S. Ct. at 1007. During the First National Conference on Radio Telephony in late February 1922, Hoover called the spectrum a public resource, insisting on a "public right over the ether roads." Minutes of Open Meetings of Department of Commerce Conference on Radio Telephony 4-5 (Feb. 27-28, 1922).

At the Fourth Annual Radio Conference in 1925, he described the "ether" as "a public medium" that must be used "for public benefit." Proceedings of the Fourth National Radio Conference and Recommendations for Regulations of Radio 7 (Nov. 9-11, 1925). Hoover also began denying applications for broadcast radio licenses on the grounds that applicants would create intolerable interference if granted licenses. The D.C. Circuit, however, ruled in 1923 that Hoover lacked authority under the 1912 Radio Act to deny licenses. Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923). Despite the ruling, Hoover continued to limit the number of broadcast radio licenses by restricting available frequencies, times of operation, and locations, as well as by delaying action on pending license applications. In April 1926, another court ruled that Hoover lacked authority under the 1912 Radio Act to limit stations to certain frequencies. United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926). After the Attorney General concurred with that ruling, 35 Ops. Atty. Gen. 126 (1926), Hoover abandoned all attempts to limit or restrict new broadcast radio stations. Nearly 200 new stations went on the air between July 1926 and February 1927, greatly increasing the levels of interference. NBC v. United States, 319 U.S. at 212, 63 S. Ct. at 1007.

Responding to the chaos over the airwaves, Congress enacted the Radio Act of 1927, Pub. L. No. 98-50, 44 Stat. 1162 (1927). The Radio Act of 1927 created the Federal Radio Commission ("FRC") to allocate bands of the spectrum to the various radio services, allot frequencies within each band to various geographic areas, and issue licenses to individual radio stations. R. Hilliard & M. Keith, The Broadcast Century: A Biography of American Broadcasting 49 (2d ed. 1997). Radio stations licensed by the FRC were given privileges to use assigned frequencies on an exclusive or shared basis in given geographic areas for up to three-year renewable terms. Even though broadcast radio licenses were no longer available as of right, anyone, in theory, could apply to the FRC for such a license.

Under the 1927 Radio Act, the FRC was charged with exercising its regulatory powers to serve the "public interest, convenience and necessity." 44 Stat. 1162, § 9 (1927); McChesney, supra, at 18; Hilliard & Keith, supra, at 51. The FRC interpreted the "public interest" as "a matter of comparative and not an absolute standard," allowing the agency to consider programming content as well as technical matters when selecting among competing applicants for broadcast licenses. 2 FRC Annual Report 21 (1928). As a result of policies adopted by the FRC under its "public interest" mandate which favored commercial radio stations, noncommercial radio broadcasting in the United States virtually disappeared within a few years, accounting for only 2% of all radio air time by 1934. McChesney, supra, at 31; Hilliard & Keith, supra, at 51.

As the quid pro quo for their government-granted exclusive privileges to broadcast over the spectrum dedicated to radio broadcasting--a scarce public resource--commercial radio stations were required by the FRC to serve as "public trustees," in theory, offering a "well-rounded" schedule of programming responsive to community needs, covering issues of public importance, and airing contrasting viewpoints. Krasnow & Goodman, The "Public Interest" Standard: The Search for the Holy Grail, 50 Fed. Comm. L.J. 605, 610-12 (1998); The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees, 11 Fed. Comm. B.J. 5, 14 (1950).

The Current Regulatory Scheme for Radio Broadcasting

In 1934, the FRC's regulatory authority over spectrum usage, including radio broadcasting, was transferred, virtually intact, to the FCC. The FCC's authority to regulate spectrum usage, including radio broadcasting, is presently found in Title III of the Act. 47 U.S.C. §§ 301 et seq.

Under Section 303 of the Act, the FCC may classify radio stations into various broadcast and non-broadcast services, allocate bands of frequencies to the respective services, allot frequencies within each band for use in different geographic areas, assign particular frequencies for use by individual radio stations, and determine the power at which each station may operate. 47 U.S.C. §§ 303(a)-(d); see also 47 U.S.C. § 307(b). The FCC exercises those powers "as public convenience, interest, or necessity requires." 47 U.S.C. § 303 (preamble).

Since the 1920's, frequencies at and above 535 kilohertz ("Khz") have been used for amplitude modulation ("AM") radio broadcasting. The AM band is currently located between 535 Khz to 1705 Khz. 47 C.F.R. Pt. 2 (1998). AM radio stations licensed to broadcast in that band typically operate at power levels between 250 watts and 50,000 watts (50 kilowatts). 47 C.F.R. §§ 73.25-27 (1998). Because of the aforementioned policies adopted by the FRC

under its "public interest," standard favoring commercial radio stations in the late 1920's, the AM band has become the virtually exclusive domain of commercial radio stations.

Since 1945, the spectrum from 88 to 108 Mhz has been allocated for FM radio stations. Under its "public interest" mandate, the FCC initially awarded most FM licenses to existing AM commercial radio stations, allowing them for many years to "simulcast" the same radio programming over their AM and FM radio stations. The "simulcast" policy effectively limited the development of FM radio as an alternative to AM radio until the policy was repealed by the FCC in the late 1960's. See Solely Aff. ¶¶ 35-37; First Am. Compl. ¶¶ 3-34.

Since the late 1940's, the FCC has reserved frequencies from 88 to 92 Mhz for educational, noncommercial broadcasting. 47 C.F.R. § 73.201 (1998). Because few colleges, universities, and non-profit entities could afford to operate full-power FM radio stations, the FCC, beginning in 1948, allowed them to broadcast with as little as 10 watts of power, effectively letting community radio stations operate between 88 and 92 Mhz for nearly 30 years. See Solely Aff. ¶ 38.

Section 301 of the Act prohibits anyone from operating a radio station--broadcast or non-broadcast--except with a license granted by the FCC. 47 U.S.C. § 301. Under Section 307 of the Act, the FCC may grant and renew a radio broadcast license to exclusively use (or share) a frequency in a given region or on a nationwide basis for a term of eight years if the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. §§ 307(a), (c), (d). See also 47 U.S.C. § 309(a). In theory, anyone may apply for a broadcast radio license from the FCC, though, as a practical matter, few have the financial resources necessary to successfully pursue such a license under the present broadcast licensing scheme.

Section 308(b) of the Act requires all applications for radio station licenses to, inter alia, "set forth such facts as the [FCC] by regulation may prescribe as to the citizenship, character, financial, technical and other qualifications of the applicant to operate [a radio] station." 47 U.S.C. § 308(b). Under its "public interest" mandate, the FCC has adopted a myriad of technical and financial qualifications that presently make it virtually impossible for applicants of modest financial means to secure a broadcast license. Because of the highly technical nature of the application process under the present broadcast licensing scheme, applicants must usually hire an attorney and an engineering consultant familiar with the FCC's application procedures. Even when an application is uncontested, an applicant typically must spend in excess of $100,000 to secure a broadcast radio license from the FCC.

The FCC often receives two or more applications for the same radio station license. Because the grant of one "mutually exclusive" application would necessarily preclude the grant of the other applications, the FCC has traditionally held a comparative hearing, under the so-called Ashbacker doctrine, Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 66 S. Ct. 148 (1945), to select the applicant that would best serve the "public interest." 47 U.S.C. §§ 307(a), 309(a).

Since 1965, the FCC has structured its comparative "public interest" assessment of mutually exclusive license applications in terms of two broad objectives: providing the "best practicable service to the public" and securing the "maximum diffusion of control of the media of mass communications." 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965) ("1965 Policy Statement"). The 1965 Policy Statement identifies six principal, but nonexclusive, factors relevant to these two objectives: localism; integration of ownership with management; past broadcast record; proposed programming service; character; and efficient use of the spectrum. Id. at 394-99.

The FCC's comparative "public interest" assessment of mutually exclusive applications is typically made in a trial-type comparative hearing before an administrative law judge who hears evidence and renders a written decision which may be appealed to the FCC's Review Board and then to the full Commission. 47 C.F.R. §§ 1.276, 1.282 (1998). The losing applicant often seeks review of the FCC's final decision in the D.C. Circuit. 47 U.S.C. § 402(b). The comparative hearing and subsequent administrative and judicial appeals greatly increase the already significant cost of securing a radio station license from the FCC.

Despite the structure provided by the 1965 Policy Statement, the FCC's comparative assessment of mutually exclusive applications remains heavily criticized as producing arbitrary results. See, e.g., Anthony, Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings, 24 Stan. L. Rev. 1 (1971). Six years ago, the D.C. Circuit declared the FCC's manipulation of the important "integration" factor to be arbitrary and capricious. Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992). One year later, the D.C. Circuit again ruled that the FCC's application of the integration criteria was arbitrary and capricious. Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). Since then, the FCC has failed to develop new comparative hearing criteria.

In part to eliminate a backlog of FM radio station applications occasioned by the Bechtel decision, Congress recently amended Section 309 of the Act to authorize the FCC, in the case of mutually exclusive applications, to award licenses based on "a system of competitive bidding" under certain circumstances. 47 U.S.C. § 309(j).

Since 1982, Congress has twice amended Section 307 of the Act to authorize the FCC by rule to exempt certain radio services, including the citizen band radio service, from the individual license requirement. 47 U.S.C. § 307(e)(1). Radio station operators within these services must still comply with other applicable provisions of Title III, as well as applicable FCC regulations. 47 U.S.C. § 307(e)(2). See also 47 C.F.R. Pt. 95.

The Decline in Community Programming

Even though there are over 12,000 broadcast radio stations in the United States, and many stations serving each metropolitan market, the radio airwaves do not abound with local programming covering virtually every issue of importance to the community from a diverse range of viewpoints. Over the past several decades, various factors--some governmental and some economic--have contributed to a significant decline in community programming heard on licensed radio stations in the United States.

First, during the 1980's, the FCC, under then Chairman Mark Fowler, largely deregulated broadcast radio stations, eliminating, for example, requirements that stations devote a significant portion of their air time (8% for AM stations and 6% for FM stations) to public affairs programming, formally ascertain community needs as a condition of license renewal, and maintain detailed program logs. See Deregulation of Radio, 84 F.C.C.2d 968, petition for recon. denied, 87 F.C.C.2d 797 (1981), aff'd in part and rev'd in part sub nom. Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983), on remand, 96 F.C.C.2d 930 (1984), vacated, 779 F.2d 702 (D.C. Cir. 1985), on remand, 104 F.C.C.2d 505 (1986). As former FCC Chairman Reed E. Hundt has observed, "[t]he FCC essentially dismantled the public interest standard in the early 1980's by conflating the 'public interest' with anything sponsors will support." Hundt, The Public Airwaves: What Does the Public Interest Require of Television Broadcasters, 45 Duke L.J. 1089, 1094 (1996). Since then, various research studies have documented a sharp decline in local news coverage, public affairs programming, and public service announcements, particularly on music stations, which predominate on the FM dial. See Solely Aff. ¶¶ 11-15; see also V. Ditingo, The Remaking of Radio 15 (1995); "R & R Survey Probes News on Music Radio in the 1990's," Radio & Records, Nov. 27, 1993, at 1.

Second, in 1984, the FCC raised the cap on the number of broadcast radio stations any single entity could own on a nationwide basis from 7 AM and 7 FM stations to 12 AM and 12 FM stations. Ditingo, supra, at 80. In 1992 the FCC raised the cap to 18 AM and 18 FM stations. Id. In 1996, Congress eliminated the nationwide ceiling on the number of broadcast radio stations which any single entity could own, though it left in place some restrictions on ownership in individual markets. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in sections of 47 U.S.C.A. (West Supp. 1997)).

Since passage of the landmark Telecommunications Act of 1996, there has been an unprecedented wave of mergers in the radio industry. Over 4,000 of the 12,000 licensed broadcast radio stations in the United States have been traded in deals collectively worth $32 billion, with the largest radio station group owners being the most aggressive purchasers. Both on a nationwide basis and in individual markets, broadcast radio station ownership has become increasingly concentrated in the hands of "corporate radio Goliaths," including the Dallas investment firm Hicks, Muse, Tate & Furst Inc., which owns over 400 stations, and CBS, which owns 175 stations. In New York City alone, CBS owns seven broadcast radio stations, including the City's two primary all-news radio outlets (WCBS-AM and WCBS-FM), which capture over 20% of the listening audience and over 37% of radio advertising dollars. The consolidation of radio station ownership over the past two years threatens to (further) stifle diversity and localism in radio programming. See Solely Aff. ¶¶ 17-24; First Am. Compl. ¶ 52; see also Amid Consolidation, Fear of Less Diversity, Choice, USA Today, July 7, 1998, at 1.

Third, the recent wave of mergers in the radio industry has been accompanied by a marked decline in the already abysmally low minority ownership of broadcast stations. The United States Department of Commerce recently reported that only 2.8% of all commercial radio and TV stations were owned by minorities in 1997, down from 3.1% in 1996. From 1995 to 1997, the number of minority-owned AM and FM stations fell 9%, from 312 to 284, the number of African American-owned FM stations fell 26% to 64, and the number of Latino-owned FM stations fell 9% to 31. These declines in minority ownership prompted FCC Chairman Kennard and FCC Commissioner Michael Powell, among others, to publicly express concern over the potential adverse effect on diversity in radio programming. See Solely Aff. ¶¶ 28-29; Maitland Aff. ¶¶ 26-28; First Am. Compl. ¶¶ 52-54.

Fourth, since the early 1980's, there has been a resurgence of network programming in the radio industry, most of which is now delivered via satellite. Today, at least 25-30% of all commercial radio stations in the United States rely, at least in part, on such programming. Even news and talk radio stations increasingly rely on satellite-delivered network programming such as the Don Imus, Howard Stern, and Rush Limbaugh talk shows. Since 1985, there has also been increasing consolidation of ownership of satellite radio networks, which are frequently owned by the same corporations that own large numbers of broadcast radio stations. According to one of the radio industry's leading newsletters, the emergence of satellite-delivered radio programming is at least partially responsible for the "disturbing trend away from 'localness' " in radio programming. J.T. Anderson & T. Moon, Distant Early Warnings: Another APR Decline in 1, 3 (Nov. 1997). See Soley Aff. ¶¶ 30-34; First Am. Compl. ¶¶ 53-54. See also Keith, supra, at 29-30; Ditingo, supra, at 15-16; Radio Stations Fight the Power, USA Today, Feb, 27, 1998, at 1B.

Finally, the significant decline in community programming heard over licensed broadcast radio stations is partially attributable to the FCC's decision in 1978 to require all new educational, noncommercial FM stations to operate with at least 100 watts of power, and existing educational, noncommercial FM stations operating below that level to upgrade to 100 watts or migrate to the commercial band on the FM dial, where they would be relegated to "secondary" status. See 47 C.F.R. §§ 73.209, 73.211 (1998); Changes in Rules Relating to Noncommercial Educational FM Broadcast Stations, 69 F.C.C.2d 240 (1978), modified, 70 F.C.C.2d 972 (1979). In adopting the "100-watt" rule, the FCC, in effect, granted a petition from National Public Radio ("NPR") to shut down low-power noncommercial radio stations, thereby freeing up channels between 88 and 92 MHz for high-powered FM stations that would be able to meet NPR's "professional" qualifications for affiliation. As a result of the FCC's "100-watt" rule and NPR's "professional" qualifications, there are fewer than 150 licensed community radio stations in the United States today. See Solely Aff. ¶¶ 35-45.

The Emergence of Microradio Stations and the FCC's Crackdown

Microradio developed in response to the dearth of local programming--programming that covers community issues from a diverse range of viewpoints--on licensed broadcast radio stations in the 1990's. See Solely Aff. ¶ 46.

There are approximately 600 microradio stations on the air today throughout the United States, none of which have broadcast licenses from the FCC. Many truly serve the communities in which they broadcast, covering community issues and airing viewpoints that have been largely ignored by licensed broadcast radio stations; providing minorities with programming that commercial radio stations will not air, since those listener groups are not coveted by advertisers; and offering a variety of unique programs. Microradio stations also play music that cannot be heard on local commercial music stations, because of rigid formats and tight playlists. Many of these stations have drawn significant listening audiences, no doubt because of the public service they provide. Solely Aff. ¶¶ 48-57.

Rather than expeditiously acting to license microradio stations so that the "public convenience, interest, [and] necessity" will be better served, 47 U.S.C. § 307(a), the FCC has instead intensified its efforts to shut down such unlicenced stations at the urging of the National Association of Broadcasters ("NAB"), the commercial broadcast industry's trade association, which has lobbied the FCC "to rid the airwaves of radio pirates." See Solely Aff. ¶ 58; First Am. Compl. ¶ 57 and Ex. E.

Since mid-1997, the FCC has shut down nearly 170 microradio stations, often in the face of protests from local community leaders and citizens. See Solely Aff. ¶ 59; Low-Power Protesters Shadow Radio Debate, Radio World, April 29, 1998, at 16; FCC Forces Radio Free Allston Off Air, Boston Globe, Nov. 2, 1997, at 10; Pirate Radio Supporters Reclaim Spot on the Dial, Tampa Tribune, Nov. 26, 1997, at 10.

To shut down microradio stations, the FCC has relied increasingly on Section 510 of the Act, 47 U.S.C. § 510, which provides for seizure and forfeiture of "electronic devices" willfully and knowingly used for unlicenced broadcasting, 47 U.S.C. § 510(a), under the "in rem" procedures available in admiralty and maritime cases. 47 U.S.C. § 510(b); see also Supplemental Rules for Certain Admiralty and Maritime Claims, Rule B. These "in rem" procedures authorize issuance of a seizure warrant based on the government's ex parte application and do not require any prompt post-seizure hearing.

Invoking the "in rem" procedures available under Section 510, the government has recently seized the broadcasting equipment of Radio Mutiny, a microradio station operating in Philadelphia, executing a seizure warrant issued based on its ex parte application. See Presser Aff. ¶ 18. Moreover, in executing a seizure warrant against a microradio station in Minneapolis, the government argued--successfully--that the station was not entitled to a hearing on its First Amendment defense either before or after the seizure. United States v. Any and All Radio Station Transmission Equip., Etc., 976 F. Supp. 1255, 1257 (D. Minn. 1997) ("All Radio"). See First Am. Compl. ¶¶ 48-57.

The FCC has also demanded--orally and in writing--that microradio stations immediately cease and desist their unlicenced broadcasting. These cease and desist orders are typically the FCC's first contact with the targeted stations. There is no attempt on the FCC's part to inform those stations of any procedural rights to contest the orders in question, other than to respond in writing to the FCC within 10 days. See All Radio, 976 F. Supp. at 1256; Presser Aff. ¶ 18; First Am. Compl. ¶ 59 and Ex. F.

Finally, some FCC officials have acted to shut down microradio stations by any means necessary to accomplish the task, regardless of their basis in law. See Chrome Aff. ¶¶ 2-9; Gudes Aff. ¶¶ 2-8; First Am. Compl. ¶ 60.

Steal This Radio

Steal This Radio was formed in late 1995 by tenant activists on the Lower East Side who were dissatisfied with the mainstream media coverage of important housing issues in their community. From the outset, Steal This

Radio's goal was not only to fill the void in media coverage on Lower East Side housing issues, but also to provide an outlet for other local news, information, and music of interest to Lower East Side residents who have long been ignored by mainstream media in the City. See Pirate Jenny Aff. ¶¶ 2-4; DJ Thomas Paine Aff. ¶¶ 4-7, 15, 19; Morales Aff. ¶¶ 3-9; Maitland Aff. ¶¶ 5-8. The moniker "Steal This Radio" was selected to signify not that Steal This Radio operated an unlicenced microradio station but rather that it operated a community-based, people's microradio station using a portion of the spectrum dedicated to radio broadcasting declared off-limits to new community radio stations by the FCC in 1978. First Am. Compl. ¶ 63.

Steal This Radio began broadcasting on the Lower East Side in November 1995 over the frequency 88.7 MHz on the FM dial, selected because it was a vacant channel with no FM radio station in New York City broadcasting on a frequency any closer than .2 MHz on either side. Queequeg Aff. ¶¶ 2-7. Steal This Radio initially broadcast at five watts of power, soon moved up to 10 watts of power, and now broadcasts at 20 watts of power, allowing its signal to be heard by approximately 100,000 people who live or work within a radius of one mile of Steal This Radio's transmitter. First Am. Compl. ¶ 64.

Through the end of 1995, Steal This Radio broadcast only on Friday nights, at a different location each week, typically from community centers and the living rooms of various apartments on the Lower East Side. In January 1996, Steal This Radio began broadcasting three nights a week from a rented studio on East 7th Street between Avenues B and C. The decision to broadcast from a fixed, rather than mobile, studio was made, in large part, to facilitate open access and participation by individuals and community groups on the Lower East Side. See DJ Thomas Paine Aff. ¶¶ 10-11, 13-19; First Am. Compl. ¶ 66.

Beginning in April 1996, Steal This Radio expanded its broadcasts to five nights a week. From July 1996 through February 1998, Steal This Radio broadcast seven nights a week, typically from 6 p.m. until dawn. DJ Thomas Paine Aff., Ex. C; First Am. Compl. ¶ 67.

Steal This Radio's weekly schedule of programming, all of which is broadcast without commercial advertising or commercial sponsorship, includes community news, political interviews and commentary, alternative health care, social and cultural shows, and specialty music shows, some in English and some in Spanish--an eclectic mix of programming unlike anything heard on commercial and noncommercial radio stations in New York City. DJ Thomas Paine Aff. ¶¶ 9, 15; Pirate Jenny Aff. ¶¶ 2-7; Morales Aff. ¶¶ 4-8; First Am. Compl. ¶¶ 66-67.

Steal This Radio's microradio station soon developed a significant listening audience, largely comprised of Lower East Side residents who tuned in to hear news and information about their neighborhood or to listen to music not played anywhere else on the radio dial. Morales Aff. ¶¶ 3-8. These broadcasts even attracted the attention of "The Paper of Record." Strauss, Radio Station for Its Neighbors, Not the FCC, N.Y. Times, Feb. 27, 1996, at B6.

Steal This Radio has neither applied for nor obtained a broadcast license from the FCC. An application for such a license would have been an exercise in futility, since the FCC no longer issues broadcast licenses to noncommercial, educational FM radio stations operating at less than 100 watts of power. Moreover, Steal This Radio, like virtually every other microradio station across the country, simply cannot afford the enormous sums necessary to secure a broadcast radio license from the FCC under the present broadcast licensing scheme. DJ Thomas Paine Aff.

From its initial broadcast in late November 1995 through late February 1998, Steal This Radio received only one complaint that its broadcasts were interfering with reception of another radio station. That came in the form of a late night telephone call from someone claiming to work for WRHU, the Hofstra University public radio station based in Hempstead, Long Island, whose primary and secondary coverage areas do not even encompass New York City, let alone the Lower East Side. To the best of plaintiffs' knowledge, there has never been a formal complaint of radio interference filed by WRHU or any other radio station at the FCC against Steal This Radio. Although Steal This Radio openly broadcast almost daily from a fixed location on the Lower East Side from January 1996, the FCC never once contacted Steal This Radio, prior to March 5, 1998, to discuss either its unlicenced broadcasts or any alleged interference those broadcasts might have posed to other radio stations. Gudes Aff. ¶¶ 2-8; DJ Chrome Aff. ¶¶ 2-3; First Am. Compl. ¶¶ 70-71.

On Saturday and Sunday, February 20-21, 1998, Steal This Radio participated, along with Radio Mutiny, a microradio station based in Philadelphia, in a widely publicized and well-attended all-day workshops on starting up microradio stations, sponsored by the New York Free Media Alliance and held in community centers in East Harlem and the South Bronx. On Thursday evening, March 5, 1998, less than two weeks later, an FCC official named Judah Mansbach visited the building from which Steal This Radio broadcast, on East 7th Street between Avenues B and C on the Lower East Side. Gudes Aff. ¶¶ 2-8; DJ Chrome Aff. ¶¶ 2-3. Speaking with one of Steal This Radio's members, Mansbach said that a complaint had been made that Steal This Radio's broadcasts were interfering with reception of WRHU, Hofstra University's public radio station, on the Lower East Side. Gudes Aff. ¶¶ 2-8. While calling his visit "friendly," Mansbach said that he would return with the United States Marshals to seize

Steal This Radio's transmitter if the station did not immediately shut down. Id. Mansbach made no mention of any rights Steal This Radio might have to contest the cease and desist order. Rather, he implied that the station had no rights at all. Mansbach left nothing in writing during his visit. Gudes Aff. ¶¶ 2-8; DJ Chrome Aff. ¶ 3; First Am. Compl. ¶¶ 72-74.

Out of concern for other tenants in the building on East 7th Street between Avenues B and C, whose homes might be searched and personal possessions seized if Mansbach were to return with federal Marshals, Steal This Radio reluctantly decided, on Saturday, March 7, 1998, to go temporarily off the air. Nonetheless, the following Thursday, March 12, 1998, Mansbach returned to the building, this time with officials from Con Edison, who, at Mansbach's direction, turned off all electricity to the building, even though Steal This Radio had been off the air for five days. DJ Chrome Aff. ¶¶ 4-9; First Am. Compl. ¶ 75.

Subsequent to Mansbach's first visit to the building on East 7th Street between Avenues B and C, plaintiff DJ Thomas Paine contacted Bruce Avery, WRHU's station manager, who confirmed for Paine that WRHU had never filed a formal complaint against STR with the FCC nor had the station ever experienced any signal interference from STR's broadcasts. DJ Thomas Paine Aff. ¶¶ 30-32; First Am. Compl. ¶ 76.

In contrast to the supposed interference that STR's broadcasts cause to WRHU's signal on the Lower East Side, outside WRHU's primary and secondary coverage areas, there are major commercial radio stations in New York City whose broadcasts regularly cause real signal interference to the broadcasts of other radio stations in the City, in their primary and secondary coverage areas. Nonetheless, the FCC has often chosen to ignore those interference problems and instead pursue a strategy of closing down the only real source of news, information, and diverse programming for local and diverse communities.

ARGUMENT

The standards for issuance of a preliminary injunction are well established in this Circuit. The moving party must demonstrate "(1) that it is subject to irreparable harm; and (2) either (a) that it will likely succeed on the merits or (b) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation and that a balance of the hardships tips 'decidedly' in favor of the moving party." Genesee Brewing Co. v. Stroh Brewing Co., 124 F.3d 137, 142 (2d Cir. 1997). A showing of irreparable harm is "'the single most important prerequisite for the issuance of [such interim relief].'" Bell & Howell: Mamiya Co. v. Masel Co. Corp., 719 F.2d 42, 45 (2d Cir. 1983) (quoting 11 C. Wright & A. Miller, Federal Practice & Procedure § 2948, at 431 (1973)). As shown below, plaintiffs easily meet those standards.

I.

PLAINTIFFS ARE SUFFERING, AND WILL CONTINUE TO SUFFER, IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION

"[O]ur historical commitment to expressive liberties dictates that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' " Paulsen v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991) (quoting Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976) (plurality opinion)); see also Fortune Society v. McGinnis, 319 F. Supp. 901, 903 (S.D.N.Y. 1970) ("To deprive one of his constitutional rights under the First Amendment . . . is in this Court's view irreparable and immediate injury."). Plaintiffs have alleged, and will show in Point II infra, the likelihood of their success on the merits in establishing serious and ongoing First Amendment injuries.

The regulatory scheme and enforcement policies and practices at issue here plainly implicate First Amendment rights. Plaintiffs will show that: (i) the spectrum dedicated to radio broadcasting is an electronic public forum of virtually unlimited character in which they have a First Amendment right to "speak", i.e., broadcast, subject to reasonable time, place and manner regulations, see Point II.A.1 infra;

(ii) the current broadcast licensing scheme is not a reasonable time, place, and manner regulation but rather an unnecessarily broad restriction that burdens substantially more broadcast speech than necessary to adequately serve the government's interest in preventing radio interference and ensuring public safety, see Point II.A.2 infra;

(iii) the licensing scheme is an impermissible prior restraint on speech to the extent that it gives the FCC virtually unfettered discretion--under a vague and amorphous "public interest" standard --to decide who may and may not speak in the electronic public forum, and under what circumstances, see Point II.A.3 infra;

(iv) the licensing scheme impermissibly allows certain speakers to monopolize expression in the electronic public forum dedicated to radio broadcasting by authorizing the FCC to grant broadcast radio licenses to exclusively use assigned frequencies, see Point II.A.4 infra;

(v) even apart from the public forum doctrine, the broadcast licensing scheme on its face violates plaintiffs' First Amendment rights because the broadcast license requirement imposes a restriction on speech that is substantially greater than necessary to accomplish the government interest in preventing signal interference and ensuring public safety; and because the vague and amorphous "public interest" standard leaves the FCC with excessive discretion in deciding who may and may not broadcast, see Point II.B.1-2 infra;

(vi) the means by which defendants have sought to enforce the broadcast licensing scheme against microradio stations in general, and Steal This Radio in particular, are constitutionally infirm because Section 510 of the Act violates plaintiffs' First, Fourth, and Fifth Amendment rights as microbroadcasters--and sanctions impermissible prior restraints on speech--to the extent that it allows the government to seize their expressive instrumentalities without the procedural safeguards constitutionally mandated to minimize the risk of censorship of protected expression, prevent unreasonable searches and seizures, and ensure due process of law, see Point II.C.1 infra; and

(vii) the FCC's practice of issuing cease-and-desist orders to microradio stations constitutes an impermissible prior restraint on speech, denies them due process of law, and violates Section 312 of the Act. 47 U.S.C. § 312. See Point II.C.2 infra.

To be sure, plaintiffs have not applied for and been denied radio broadcasting licenses from the FCC. Such applications would, however, be an exercise in futility, given, among other things, the fact that the FCC currently prohibits microradio stations from broadcasting. In any event, plaintiffs may assert these facial challenges to the current broadcast licensing scheme without first applying to the FCC for radio broadcasting licenses and awaiting the inevitable denial of their applications. See, e.g., City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755-56, 108 S. Ct. 2138, 2143 (1988) ("[O]ur cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license."); Freedman v. Maryland, 380 U.S. 51, 56, 85 S. Ct. 734, 737 (1965) ("[I]t is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license."); Staub v. City of Baxley, 355 U.S. 317, 319-20, 78 S. Ct. 277 (1958) ("The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review...").

Even apart from violation of plaintiffs' First Amendment rights, the evidence submitted herewith establishes tangible irreparable injury. Acting through its field agent Judah Mansbach, the FCC has already effectively shut down Steal This Radio once for almost two months through actions plainly not authorized under the Act. DJ Thomas Paine Aff. ¶ 23; Gudes Aff. ¶¶ 2-8. Now that Steal This Radio is back on the air, there is an imminent risk that defendants will again attempt to shut the station down, confiscate the station's radio broadcasting equipment, and assess civil fines against, if not criminally prosecute, Steal This Radio's members. Similarly, Free Speech's members cannot engage in microbroadcasting activities, in connection with or separate from Steal This Radio, without facing the imminent risk of confiscations, civil fines and criminal prosecutions.

Finally, at issue here is not only the First Amendment right to engage in speech but also the right to receive speech. It is well established in Supreme Court jurisprudence that the First Amendment protects the public's right to receive information as well as the speaker's freedom to express herself. See, e.g., Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756, 96 S. Ct. 1817, 1823 (1976) ("[W]here a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both."); Kleindienst v. Mandel, 408 U.S. 753, 762, 92 S. Ct. 2576, 2581 (1972) (listeners' right to receive information and advise from willing speakers is "well established"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390, 89 S. Ct. 1794, 1807 (1969) ("Red Lion") ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."); Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247-48 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); Lamont v. Postmaster General, 381 U.S. 301, 307, 85 S. Ct. 1493, 1496 (1965); Thomas v. Collins, 323 U.S. 516, 534, 65 S. Ct. 315, 324-25 (1945) (upholding labor organizer's right to speak and workers' right "to hear what he had to say"). Moreover, the right to "receiv[e] information from willing speakers" is an enforceable one, for its violation constitutes an injury "sufficient to support [a plaintiff's] standing to bring a constitutional challenge." Taylor v. Resolution Trust Corp., 56 F.3d 1497, 1508 (D.C. Cir. 1995).

Time and again, the Supreme Court has recognized the First Amendment right of the public to receive an array of perspectives, opinions and ideas through radio and television:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Red Lion, 395 U.S. at 390, 89 S. Ct. at 1807 (internal quotations and citations omitted).

Frank Morales, Joan Mussey, and others who listen to the broadcasts of Steal This Radio thus have a First Amendment right to receive the information from those individuals who provide it through this medium. As demonstrated in the Affidavits of Fran Morales, Pirate Jenny, Hermana Numero Uno, and DJ Thomas Paine, Steal This Radio's broadcasts provide news and information to the community, foster communication among local residents and neighbors, assist in the development of political, educational, and cultural groups and associations, and contribute to the marketplace of ideas. By seeking to squelch those broadcasts, the FCC's scheme violates both plaintiffs' right to speak and their listeners' equally important right to hear the political, cultural and educational information conveyed to their community.

II.

PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Plaintiffs Are Likely to Succeed on Their "Public Forum" Challenges to the Licensing Scheme for FM Radio Stations

It is beyond dispute that the spectrum dedicated to radio broadcasting is within the "'public domain'," notwithstanding its use by privately owned broadcast radio stations licensed by the FCC. CBS, Inc. v. FCC, 453 U.S. 367, 395, 101 S. Ct. 2813, 2829 (1981) (quoting Office of Communication of United Church of Christ v. FCC, 337 F.2d 994, 1003 (D.C. Cir. 1966) (Burger, J.)). Section 301 of the Act provides "for the use of [radio] channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted" by the FCC. 47 U.S.C. § 301. Similarly, Section 304 states, in relevant part, that "[n]o station license shall be granted by the [FCC] until the applicant therefor shall have waived any claim to the use of any particular frequency . . . as against the regulatory power of the United States." 47 U.S.C. § 304. "The policy of the Act is [thus] clear that no person is to have anything in the nature of a property right as a result of the granting of a license." FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 475, 60 S. Ct. 693, 697 (1940) ("FCC v. Sanders Bros."); accord Red Lion, 395 U.S. at 394, 89 S. Ct. at 1809 ("Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them."); see also M. Hamburg & S. Brotman, Communications Law and Practice, § 1.10[4], at 1-10 (1998) (broadcast licensing scheme premised on assumption that spectrum remains "inalienable public property," to which broadcasters have been assigned
rights to use on short-term bases).

The spectrum dedicated to radio broadcasting is not merely within the public domain; it is also a "valuable and limited public resource," Columbia Broadcasting Sys., Inc. v. Democratic Nat. Comm., 412 U.S. 94, 130, 93 S. Ct. 2080, 2100 (1973) ("CBS v. DNC"), which "simply is not large enough to accommodate everybody." National Broadcasting Co. v. United States, 319 U.S. 190, 226, 63 S. Ct. 997, 1008 (1943) ("NBC v. United States"); accord CBS v. DNC, 412 U.S. at 101, 93 S. Ct. at 2086 ("All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated.").

Even though the spectrum dedicated to radio broadcasting is limited or scarce insofar as the number of broadcast radio stations that may be accommodated at any one time, plaintiffs will show that it is a public forum of virtually unlimited character--albeit a public forum presently subject to a constitutionally flawed licensing scheme.

1. The spectrum dedicated to radio broadcasting is a traditional and designated public forum of virtually unlimited character.

a. Public forum analysis is appropriate here

The public forum doctrine has been described as a "fundamental" First Amendment principle. Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 280, 104 S. Ct. 1058, 1064 (1984). Although not formally introduced into First Amendment jurisprudence until 1972, Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 n.3, 99-100, 92 S. Ct. 2286, 2289 n.3, 2292 (1972), its genesis lies in Justice Roberts' famous dictum in Hague v. CIO:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

307 U.S. 496, 515, 59 S. Ct. 954, 963 (1939); see also Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1960 Sup. Ct. Rev. 1.

The First Amendment derives, of course, from "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964); see also Associated Press v. United States, 326 U.S. 1, 20, 65 S. Ct. 1416, 1424 (1945) (First Amendment premised on "the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"). The public forum doctrine, in turn, rests on the proposition that:

in an open democratic society, the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.

Kalven, supra, 1965 Sup. Ct. at 11-12.

The mere fact that the spectrum dedicated to radio broadcasting is not tangible property like streets and parks does not render public forum analysis inapposite because the public forum doctrine may apply to any "particular means of communication," even if it "lacks a physical status." Cornelius v. Legal Def. & Educ. Fund, Inc.,

473 U.S. 788, 801, 105 S. Ct. 3439, 3448 (1985) ("Cornelius") (forum analysis of charity drive for federal employees); accord Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1640-41 (1998) ("Forbes") (forum analysis of public station's televised candidate debate); Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 2517 (1995) (forum analysis applied to student activity fund having "metaphysical" rather than "spatial or geographic" character); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47, 103 S. Ct. 948, 956 (1983) ("Perry") (forum analysis of school's internal mail system); Lehman v. City of Shaker Heights, 418 U.S. 298, 300, 94 S. Ct. 2714, 2715 (1974) (forum analysis of advertising spaces in city buses); New York Magazine, Div. of Primedia Magazines v. Metropolitan Transp. Auth., 136 F.3d 123, 128-30 (2d Cir. 1998)(forum analysis of advertising space on buses operated by public transit authority).

To be sure, the Supreme Court recently observed in Forbes that "the public forum doctrine should not be extended in a mechanical way to the very different context of public . . . broadcasting." 118 S. Ct. at 1639. Forbes, however, involved a claim of a right of access to air time on a single broadcast television station. Id. at 1637. The Court declined to analyze such claims generally under the public forum doctrine because:

In the case of television broadcasting . . . broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.

Id. at 1638; see also CBS v. DNC, 412 U.S. at 124-27, 93 S. Ct. at 2098-2100. By contrast, plaintiffs in this case seek access not to air time on any broadcast radio station but rather to the spectrum dedicated to radio broadcasting. Application of the public forum doctrine in that very different context surely would not intrude upon the journalistic discretion of other radio broadcasters.

The spectrum dedicated to radio broadcasting, moreover, has "special characteristics" which unmistakably support the conclusion that it is "a forum of some type." Forbes, 118 S.Ct. at 1640-41. That spectrum has been allocated, in theory, to "secure local means of expression," FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 362, 75 S. Ct. 855, 858 (1955), so that "views and voices . . . representative of [the] community" may be heard, Red Lion, 395 U.S at 399, 89 S. Ct. at 1806, without government "censorship." 47 U.S.C. § 326. In short, "by design," the "very purpose" of the spectrum dedicated to radio broadcasting is to serve as a forum for community expression "with minimal intrusion" by the government. Forbes, 118 S. Ct. at 1641.

b. The categories of fora

Public forum analysis begins by closely focusing "on the character of the property at issue," Perry, 460 U.S. at 44, 103 S. Ct. at 954, to determine "whether it is public or non-public in nature." Cornelius, 473 U.S. at 801, 105 S. Ct. at 3448. The public forum doctrine recognizes three categories of government fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." Id. at 800, 105 S.Ct. at 3449 (citing Perry, 460 U.S. at 45-46, 103 S. Ct. at 954-55).

Traditional public fora consist of "[p]laces which by long tradition or by government fiat have been devoted to assembly or debate." Perry, 460 U.S. at 45, 103 S. Ct. at 954. They include such "quintessential public for[a]" as "parks, streets, and sidewalks, Burson v. Freeman, 504 U.S. 191, 196, 112 S. Ct. 1846, 1850 (1992), which have " immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Perry, 460 U.S. at 45, 103 S. Ct. at 954-55 (quoting Hague v. CIO, 307 U.S. at 515, 59 S. Ct. at 963); accord United States v. Grace, 461 U.S. 171, 176, 103 S. Ct. 1702, 1707 (1983) ("`[P]ublic places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be public forums.'"). Traditional public fora are not limited, however, simply to fora held in trust for expressive activity "from time out of mind" but also include fora opened for public expression by "government fiat." Perry, 460 U.S. at 45, 103 S. Ct. at 955; accord Forbes, 118 S. Ct. at 1641.

To be sure, "[t]he [Supreme] Court has rejected the view that traditional public forum status extends beyond its historic confines" in declining to accord such status to airport terminals. Forbes, 118 S. Ct. at 1641, citing International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 681, 112 S. Ct. 2701, 2706-07 (1992) ("ISKCON"). In declining to classify airport terminals as traditional public fora, however, the Court only partially relied on the fact that such terminals had not been held in public trust for expressive activity "'from time out of mind.'" ISKCON, 505 U.S. at 681, 112 S. Ct. at 2706, (quoting Hague v. CIO, 307 U.S. at 515, 59 S. Ct. at 963). It also took into account that expressive activity in airport terminals had not become "common practice" in such places until "recent years." Id., 112 S. Ct. at 2706. The ISKCON view that traditional public forum status is a closed category limited to its historical confines is thus mere dictum--dictum that may be rejected by the Court in subsequent cases as easily as it rejected ISKCON's dictum that public forum analysis is only relevant to public property.

Designated public fora, by contrast, consist of places that have been opened by government "for use by the public for expressive activity." Perry, 460 U.S. at 45, 103 S. Ct. at 955. "[T]he government creates a designated public forum when it makes its property generally available to a certain class of speakers. . . . On the other hand,

[it] does not create a designated public forum when it does no more than reserve eligibility for access to forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission,' to use it." Forbes, 118 S. Ct. at 1642 (quoting Cornelius, 473 U.S. at 804, 105 S. Ct. at 1642). The critical distinction is thus between "'general access,'" indicating that the property is a designated public forum, and "'selective access,'" indicating that it is a non-public forum. Id. (quoting Cornelius, 473 U.S. at 803, 805, 105 S. Ct. at 3449-50, 3450-51). While a designated public forum may be of "unlimited character," Denver Area, 518 U.S. at 791, 116 S. Ct. at 2409 (Kennedy, J., concurring in part and dissenting in part), it may also "be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects." Id., 460 U.S. at 46 n.7, 103 S. Ct. at 955 n.7 (citing Widmar v. Vincent, 454 U.S. 263, 264 102 S. Ct. 269, 272 (1981) (university meeting facilities) and City of Madison Joint School Dist. v. Wisconsin Pub. Employment Relations Comm'n, 429 U.S. 167, 97 S. Ct. 421 (1981) (school board business)).

Measured by these standards, the spectrum dedicated to radio broadcasting plainly qualifies as both a traditional public forum and dedicated public forum of virtually unlimited character.

c. The spectrum dedicated to radio broadcasting is a public forum.

From the very inception of radio communications, the spectrum was open "for purposes of assembly, communicating thoughts between citizens, and discussing public questions," Hague v. CIO, 307 U.S. at 515, 59 S. Ct. at 963, at first through amateur stations and later through the early broadcast radio stations, including the many that were operated by nonprofit organizations. Indeed, it was obviously for this reason that Secretary Hoover, addressing the Fourth Annual Radio Conference in 1925, described the "ether" as "a public medium" that must be used "for public benefit." Proceedings of the Fourth National Radio Conference and Recommendations for Regulations of Radio 7 (Nov. 9-11, 1925). At least until 1927, anyone, in theory, could apply for and obtain a license to operate a broadcast radio station for such purposes. NBC v. United States, 319 U.S. at 212, 63 S. Ct. at 1007 (citing Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923), United States v. Zenith Radio Corp., 12 F.2d 614 (N.D.Ill. 1926), and 35 Ops. Atty. Gen. 126); see also Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 213-14 (1982) (describing role played by the Secretary of Commerce under Radio Act of 1912 as that of a "nondiscriminating registrar").

Even after Congress had created the FRC in 1927 and the FCC in 1934 to assign licenses selectively to broadcast radio stations, because "the radio spectrum simply [was] not large enough to accommodate everybody," NBC v. United States, 319 U.S. at 213, 63 S. Ct. at 1008, the spectrum dedicated to radio broadcasting remained virtually open for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Licensed broadcast radio stations, as the quid pro quo for being "given the privilege of using scarce radio frequencies," have been required to serve as "proxies for the entire community," with obligations to present those views and voices which are representative of their communities and which would otherwise, by necessity, be barred from the airwaves. Red Lion, 395 U.S. at 394, 89 S. Ct. at 1808; accord FCC v. Allentown Broadcasting Co., 349 U.S. at 362, 75 S. Ct. at 858 ("community radio mouthpiece[s]").

Thus, for many years, the "public interest" standard under which first the FRC and then the FCC awarded broadcast licenses was interpreted and applied to require broadcast radio stations to provide air time for community views and voices as a condition for license renewal. See, e.g., Great Lakes Broadcasting Co., 3 FRC Ann. Rep. 32, 34 (1929) (declaring that stations should meet "tastes, needs, and desires of all substantial groups among the listening public" by broadcasting "a well-rounded program" including "discussion of public questions"), aff'd in part and rev'd in part, Great Lakes Broadcasting Co. v. FRC, 37 F.2d 993 (D.C. Cir.), cert. dismissed, 281 U.S. 706, 50 S. Ct. 467 (1930); FCC, Public Service Responsibility of Licensees (1946), reprinted in Documents of American Broadcasting 131, 133 (F. Kahn ed., 3d ed. 1978) (describing broadcasters' public interest obligations as encompassing four requirements, including programming devoted to discussion of local public issues); Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949) (requiring broadcasters to provide adequate coverage of controversial issues of public importance to community and reasonable opportunity for contrasting viewpoints on those issues); FCC Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7291, 7295 (1960) (listing "opportunity for local self expression" among "major elements usually necessary" for broadcaster to meet "public interest" obligations); Primer on Ascertainment of Community Problems by Broadcasting Applicants (Report and Order), 27 F.C.C.2d 650 (1971) (requiring broadcasters to conduct formal ascertainment studies of community programming needs in 19 categories); Applications of Fox Television Stations, Inc., 8 F.C.C. Rcd. 2361, 23__ ("[t]he presence or absence of any special effort at community outreach or towards providing a forum for local self-expression" is relevant to whether broadcast licensee is entitled to receive renewal expectancy), review denied, 9 F.C.C. Rcd. 62 (1993).

Moreover, "the broadcasting field [remains, in theory,] open to anyone [who seeks a broadcast radio license], provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment and financial ability to make good use of the assigned channel." FCC v. Sanders Bros., 309 U.S. 470, 475, 60 S. Ct. 693, 697 (1940). In addition, "the channels presently

occupied remain free for a new assignment to another licensee in the interest of the listening public." 309 U.S. at 470, 60 S. Ct. at 697. Eligibility for broadcast radio licenses thus has never been "reserved" to a "particular class of speakers" based on status. Cf. Forbes, 118 S. Ct. at 1642 (qualified candidates); Widmar v. Vincent, 454 U.S. at 264, 102 S. Ct. at 272 (registered student groups); Cornelius, 473 U.S. at 804, 105 S. Ct. at 3450 (charitable campaigns).

None of the Supreme Court's broadcasting decisions preclude classification of the spectrum as a traditional public forum or designated public forum of unlimited character. If anything, the Court's recent decision in Forbes--holding that a televised debate of qualified candidates for public office was a non-public forum--renders it even more imperative to recognize the spectrum dedicated to radio broadcasting as a public forum because the decision leaves public TV and radio stations free to exclude qualified candidates from debates which they sponsor and broadcast, and thereby permits them to limit the diversity of core political speech over the airwaves, so long as the decisions to exclude are "reasonable, viewpoint-neutral exercise[s] of journalistic discretion." 118 S. Ct. at 1644.

Nor does the Court's decision in CBS v. DNC preclude classification of the spectrum dedicated to radio broadcasting as a public forum. In that case, the Court observed that its public forum decisions provided little guidance in resolving the question of whether there was a First Amendment right of access to air time on broadcast stations for paid editorial advertisements because none of the decisions involved a forum that had an "affirmative and independent statutory obligation to provide full and fair coverage of public issues." 412 U.S. at 129, 93 S. Ct. at 2100. In contrast, not only is the forum here different from that reviewed in CBS v. DNC, but the Fairness Doctrine, which obligated broadcasters to provide full and fair coverage of public issues, and on which the Court's observation rested, has long since been repealed. In re Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York, 2 F.C.C. Rcd. 5043 (1987), aff'd sub nom. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

Similarly, the mere fact that the spectrum dedicated to radio broadcasting remains limited--in the sense that all who may seek to operate a broadcast radio station "cannot be satisfactorily accommodated," CBS v. DNC, 412 U.S. at 101, 93 S. Ct. at 2086, at least at the very same time--does not preclude its classification as a public forum. Virtually all public fora --both traditional and designated--are subject to "competing uses" that cannot all be accommodated satisfactorily at the very same time, Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 130, 112 S. Ct. 2395, 2401 (1992) ("Forsyth County"), and therefore all such fora require the use of at least some time, place and manner regulations to prevent "interference" among those uses. Kovacs v. Cooper, 336 U.S. 77, 86-87, 69 S. Ct. 448, 453 (1949); accord Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S. Ct. 2294, 2303 (1972)("[T]wo parades cannot march on the same street simultaneously, and government may allow only one.").

Furthermore, the spectrum scarcity concept as "the prevailing rationale for broadcast regulation" has been subjected to persistent criticism in recent years. FCC v. League of Women Voters of Cal., 468 U.S. 364, 376-77 n.11, 104 S. Ct. 3006 (1984). As Judge Bork observed in Telecommunication Research and Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986) (Bork, J., concurring) ("[S]carcity is a universal fact, [which] can hardly explain regulation in one context and not another."). Academics have also consistently noted that scarcity is an immutable characteristic of all public goods, presumably including public fora, and not a unique attribute of the electromagnetic spectrum. See, e.g., Coase, The Federal Communications Commission, 2 J. L. & Econ. 1 (1959) (stating that scarcity is prevalent in all economic goods); Spitzer, The Constitutionality of Licensing Broadcasters, 64 N.Y.U. L. Rev. 990, 1007-20 (1989); Powe, American Broadcasting and the First Amendment 202-03 (1987).

Indeed, even the FCC concluded that "the concept of scarcity--be it spectrum or numerical--is irrelevant," when it repealed the Fairness Doctrine a decade ago. In re Complaint of Syracuse Peace Council, 2 F.C.C. Rcd. at 5054 (rejecting Fairness Doctrine complaint on the grounds that the doctrine violated the First Amendment); see also Inquiry into Section 73.1910 of Commission's Rules & Regulations Concerning Alternatives to General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.3d 145 (1995); Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 221-25 (1982).

In sum, the spectrum dedicated to radio broadcasting is both a traditional public forum and a dedicated public forum of virtually unlimited character. "Although [government] is not required to indefinitely retain the open character of [a designated public forum], as long as it does so it is bound by the same standards as apply in a traditional public forum." Perry, 460 U.S. at 46, 103 S. Ct. at 955. The public forum doctrine "subjects to the highest scrutiny the regulation of speech on government property traditionally available for public expression." Loper v. New York City Police Dept., 999 F.2d 699, 703 (2d Cir. 1993), citing ISKCON, 505 U.S. at 678, 112 S.Ct. at 2705 (1992). As shown below, the broadcast licensing scheme, on its face, fails such scrutiny.

2. The broadcast licensing scheme burdens substantially more speech than necessary to serve the government's interests in preventing signal interference and ensuring public safety.

Government often (but not always) regulates the time, place and manner of expressive activities in public fora through licensing or permit schemes, so as to accommodate "the other proper uses" of those fora. Cox v.

New Hampshire, 312 U.S. 569, 576, 61 S. Ct. 762, 766 (1941). Such licensing schemes are, however, "prior restraint[s] on speech" and therefore presumptively invalid. Forsyth County, 505 U.S. at 130, 112 S. Ct. at 2401 (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S. Ct. 631, 639 (1963)). To survive First Amendment scrutiny, "any permit [or licensing] scheme controlling the time, place, and manner of speech [in a public forum] must [, at the very least,] not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." Forsyth County, 505 U.S. at 130, 112 S. Ct. at 2401 (citing United States v. Grace, 461 U.S. 171, 177, 103 S. Ct. 1702, 1706 (1983)). Simply put, the broadcast licensing scheme--in its present form--fails to meet these standards.

First, the scheme is clearly content-based, since "the Act does not restrict the [FCC] merely to supervision of the traffic [but also] puts upon the [FCC] the burden of determining the composition of that traffic." NBC v. United States, 319 U.S. at 215-16, 63 S. Ct. at 1009. The FCC thus routinely considers broadcast license applicants' proposed programming and past programming records in deciding whether to grant them broadcast licenses or renew their licenses.

Second, the broadcast licensing scheme plainly is not narrowly tailored to meet the government's interests in preventing signal interference among radio stations and ensuring public safety. To be so tailored, a time, place, and manner regulation must not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward v. Rock Against Racism, 491 U.S. 781, 799, 109 S. Ct. 2746, 2758 (1989). While narrow tailoring does not require the government to adopt "the least restrictive or least intrusive means of" serving its legitimate interests, id. at 798, 109 S. Ct. at 2757-58, the availability of "obvious less-burdensome alternatives . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable," City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13, 113 S. Ct. 1505, 1510 n.13 (1993) ("Discovery Network"), and thus narrowly tailored. Id. at 430, 113 S. Ct. at 1517; accord Gerritsen v. City of Los Angeles, 994 F.2d 570, 577 (9th Cir.) (in applying narrow tailoring standard, courts look to "fit" between regulation and stated purposes). Indeed, "[i]n a case such as this in which the challenged regulation seems likely to obliterate the plaintiffs' message, the existence of less restrictive alternatives that would protect the valid regulatory interest is material to the constitutional issue." Ayres v. City of Chicago, 125 F.3d 1010, 1016 (7th Cir. 1997)

While operating "[w]ithin that framework of facial neutrality," the present broadcast license scheme has "a vastly uneven impact" on large and small broadcasters. N.A.A.C.P., Western Region v. City of Richmond, 743 F.2d 1346, 1356 (9th Cir. 1984). It drastically burdens microbroadcasters' speech, since few, if any, have the financial resources necessary to navigate successfully the broadcast licensing process in its present form, which requires meeting the myriad technical and financial qualifications imposed by the FCC under Section 308, competing against mutually exclusive applicants in the comparative hearing required by Section 307, and defending or challenging the administrative law judge's recommended decision through two rounds of administrative review and one round of judicial review.

Not only does the broadcast license requirement drastically burden microbroadcasters' speech, it also burdens substantially more speech than necessary to serve the government's asserted interests in preventing signal interference among radio stations and ensuring public safety. Indeed, there are obvious less-restrictive alternatives that would adequately serve those interests without effectively silencing all microbroadcasters, such as a registration or lottery scheme comparable to those sometimes used to allocate scarce public space among different speakers in public fora. See, e.g., Bery v. City of New York, 97 F.3d 689, 698 (2d Cir. 1996) ("The system employed by San Francisco [for street artists] might provide a model: certain areas are set aside for art sales and a weekly lottery assigns spots") cert. denied, 117 S. Ct. 2408 (1997); Davenport v. City of Alexandria, Va., 710 F.2d 148, 150 (4th Cir. 1983) (exhibitions and performances allowed in eight "open spaces"; permits issued on first-come, first-served basis; no more than three permits per city block may be issued at any one time).

Under such a scenario, the government might set aside certain unused frequencies within the FM band, no closer than .2MHz to any licensed frequency, for use by microradio stations on a first-come, first-served or lottery basis for limited periods (e.g., four years) at geographically dispersed locations in each community, subject to power limitations (e.g., 50 watts in urban areas and 100 watts in rural areas), so as to prevent overlap and signal interference, and operating rules requiring use of type-accepted transmitting equipment.

The feasibility of such a non-licensing alternative to the present broadcast licensing scheme for microradio stations is evident from the various exemptions to individual licensing authorized by Congress and implemented by the FCC over the past two decades. In 1986, for example, the FCC eliminated the requirement of individual station licenses for both Radio Control Radio Service and Citizen Band Radio Service, observing that spectrum management in the R/C and CB radio services was achieved "exclusively through the mechanisms of type acceptance and operating rules, rather than by licensing." Amendment of Parts 1 and 95 of the Commission's Rules to Eliminate Individual Station Licenses in the Radio Control (R/C) Radio Service and Citizen Band (CB) Radio Service, 53 RR2d 1479, 1480 (1983). In particular, the FCC transmitters for these services are now type accepted to ensure that they are operated on legal frequencies with legal power, and frequency assignments, power limitations, and antenna height restrictions are determined by operating rules, not by licensing. Id.; see, e.g., 47 C.F.R.

§§ 95.207 (establishing permissible frequencies for R/C station transmission); 95.209 (specifying radio equipment to be used); 95.210 (specifying permissible transmitter power output). Even without individual licenses, the FCC treats persons who violate the operating rules as operating without proper authorization in violation of Sections 301 and 302 of the Act. Id. at 1481. Similarly, the FCC has authorized a new Low Power Radio Service to "promote the development of telecommunications technology for people with disabilities," "radio-based law enforcement," and "medical diagnostic tools." 61 FR 46563 at 1211. As with the Citizens Band Radio Service, Low Power Radio Stations also are not licensed on an individual basis, but rather are regulated by operating rules. Id.

"Exemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place." City of Ladue v. Gilleo, 512 U.S. 43, 52, 114 S. Ct. 2038, 2044 (1994) (citing Discovery Network, 507 U.S. at 424-26, 113 S. Ct. at 1514-15) (city's stated public safety concern was insufficient to justify ban on newsracks dispensing commercial handbills, since they were "no more harmful" to public safety than newsracks dispensing newspapers, which city allowed); Loper, 999 F.2d at 705 ("If individuals may solicit for charitable and other organizations" on New York City's sidewalks, "no significant governmental interest is served by prohibiting others [from] soliciting for themselves" on those sidewalks). Clearly, the exemptions from the individual radio station license requirement authorized by Congress and implemented by the FCC significantly diminish the credibility of the agency's rationale for requiring all broadcast radio stations to be licensed, no matter how low the power levels at which they operate or how limited the coverage areas they serve.

Finally, the present broadcast licensing scheme leaves micro-broadcasters such as Steal This Radio without ample alternative channels of communication in the same public forum. Cf. Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495 (1988) (protesters were not barred from disseminating their messages in same residential neighborhoods where ordinance prohibited picketing directed at particular residences). The possibility that microbroadcasters such as Steal This Radio might communicate through channels of communication other than the spectrum dedicated to radio broadcasting does not remove the constitutional infirmity. "'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556, 95 S. Ct. 1239, 1245 (1975) (quoting Schneider v. State of New Jersey, 308 U.S. 147, 163, 60 S. Ct. 146, 151 (1975)).

In any event, those other channels of communications are plainly inadequate for microbroadcasters such as Steal This Radio which seek to reach the economically disadvantaged, who rely primarily on radio for news and information because they cannot afford to subscribe to cable television or to gain access to the Internet. Cf. Bery v. City of New York, 97 F.3d at 698 ("Displaying art on the street has a different expressive purpose than gallery or museum shows; it reaches people who might not choose to go into a gallery or museum or who might feel excluded or alienated from these forums").

3. The "public interest" standard impermissibly gives the FCC unfettered discretion to decide who may and may not broadcast in the electronic public forum for radio broadcasting and under what conditions.

It is well settled that a licensing scheme controlling the time, place and manner of expressive activity in a public forum may not, consistent with the First Amendment, confer unbridled discretion on a government official, "because without standards governing the exercise of discretion, [the] official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." City of Lakewood, 486 U.S. at 763-64, 108 S. Ct. at 2147 (citation omitted). Such discretion is "inherently inconsistent with a valid time, place, and manner regulation because [it] has the potential for becoming a means of suppressing a particular point of view." Forsyth County, 505 U.S. at 130, 112 S.Ct. at 2401.

The Supreme Court has thus struck down a local law giving the chief of police "uncontrolled discretion" to grant or deny sound device permits for use in public parks. Saia v. New York, 334 U.S. 558, 560, 68 S. Ct. 1148, 1150 (1948). Similarly, the Court has declared unconstitutional a law giving a county official unbridled discretion to set the fees for parade permits because "[n]othing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees." Forsyth County, 505 U.S. at 133, 112 S.Ct. at 2403. Likewise, the Court has invalidated an ordinance empowering the mayor to approve or disapprove newsrack placements on such terms and conditions as he deemed "necessary and reasonable" because that standard would have allowed him to censor publications by requiring placement of their newsracks "in an inaccessible location." City of Lakewood, 486 U.S. at 769, 108 S. Ct. at 2150-51.

The "public interest" standard under which the FCC has awarded licenses to broadcast radio stations, and set the terms and conditions on their operations, for nearly 65 years, 47 U.S.C. §§ 307(a), 309(a), plainly would not survive First Amendment scrutiny if it governed the issuance of permits or licenses for expressive activity in any public forum other than the spectrum dedicated to radio broadcasting. See, e.g., Shuttlesworth v. City of Birmingham, Alabama, 394 U.S. 147, 150-51, 89 S. Ct. 935, 938-39 (1969) (declaring unconstitutional ordinance empowering city commission to refuse a parade, procession, or demonstration permit if deemed necessary to protect "the public welfare, peace, safety, health, decency, good order, morals or convenience," on the grounds that ordinance gave city commission "virtually unbridled and absolute power to prohibit any parade, procession, or

demonstration on the city's streets or public ways"); see also Southeastern Promotions, 420 U.S. at 554, 95 S.Ct. at 1244 (implying that "best interest of the community" standard would not survive First Amendment scrutiny). It cannot survive First Amendment scrutiny here.

Since its first appearance in the Radio Act of 1927, the "public interest" standard has been regularly praised or condemned, or both, for its imprecision. Among those making or acknowledging such observations have been the FRC's first general counsel, former FCC Chairmen, former FCC Commissioners, and leading broadcast industry lawyers.

Media scholars and social critics have likewise recognized that the "public interest" standard is hopelessly vague. See, e.g., D. LeDuc, Beyond Broadcasting: Patterns in Policy and Law, 10-11 (1987) (concluding that the "vague[ ]" and "nebulous" public interest standard has "constantly inhibited" the FCC's broadcast policymaking and left the FCC "vulnerable to both legislative and judicial critics who validly questioned whether or not any position the agency adopted was clearly justified by the standard's requirements"); R. McMahon, Federal Regulation of the Radio and Television Broadcast Industry in the United States 1927-1959 243 (1979) ("Such a standard is in actuality so vague as to be all but meaningless. It gives the [FCC] almost complete latitude to decide individual cases as it wishes -- not even subject to the need for maintaining the corpus of its law consistent"); A. Rand, Capitalism: The Unknown Ideal 126 (1967) (denouncing public interest standard as "blank check on totalitarian power over the broadcasting industry, grant[ed] to whatever bureaucrats happened to be appointed to the [FCC]").

In the final analysis, there can be no serious dispute that the phrase "public interest" specifies absolutely no standard at all. See Coates v. City of Cincinnati, 402 U.S. 611, 614, 91 S. Ct. 1686, 1688 (1971) (ordinance prohibiting sidewalk assembly of three or more persons in manner "annoying" to passers by was void for vagueness because "no standard of conduct is specified at all").

Given the vague and amorphous "public interest" standard, it is not surprising that the FCC has been regularly criticized over the years for capricious broadcast licensing decisions. In the late 1950's, for example, New York University law professor Bernard Schwartz offered the following observation on how the FCC had awarded TV station licenses through the comparative hearing process during that decade:

the FCC has decided some sixty television cases involving comparative hearings of mutually exclusive applicants. Analysis of these cases indicates a most disturbing inconsistency on the part of the [FCC] in applying its criteria. Whim and caprice seem to have been the guides rather than the application of settled law to the facts of the case. In effect the [FCC] juggles its criteria in particular cases so as to reach almost any decision it wishes and then orders its staff to draw up reasons to support the decision.

B. Schwartz, The Professor and the Commissions 105 (1959); see also Schwartz, Comparative Television Licensing and the Chancellor's Foot, 47 Geo. L.J. 655 (1959); L. Jaffe, The Scandal in TV Licensing, Harper's Magazine, Sept. 1957, at 77.

Even after the FCC sought to structure its comparative assessment of mutually exclusive broadcast license applications by identifying six principal factors relevant to its two broad "public interest" objectives of providing the "best practicable service to the public" and securing the "maximum diffusion of control of the media of mass communications," 1965 Policy Statement, 1 F.C.C.2d at 394-99, the comparative "public interest" analysis remains widely regarded as based on whim and caprice. See, e.g., Anthony, Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings, 24 Stan. L. Rev. 1, 4 (1971) ("An absence of principle to govern critical elements makes the process of decision inescapably subjective and complex in all but the simplest cases"); Botein, Comparative Broadcast Licensing Procedures and the Rule of Law: A Fuller Investigation, 6 Ga. L. Rev. 743, 752-54 (1972) (FCC comparative hearings operate under vague and contradictory factors and are inherently subjective); R. Noll, M. Peck & J. McGowan, Economic Aspects of Television Regulation 112-14 (1973) (statistical analysis of comparative hearings for TV station licenses showing that qualities that FCC claims are desirable actually have lessened applicant's chances of being awarded licenses); Geller, A Modest Proposal for Modest Reform of the Federal Communications Commission, 63 Geo. L.J. 705, 715-18 (1975) (factors and standards for combining them are often ignored or explained away by FCC).

The FCC's comparative "public interest" analysis for selecting broadcast licensees has not only been "unremittingly criticized," Anthony, supra, 24 Stan. L. Rev. at 3, but it has also twice recently been declared to be arbitrary and capricious by the D.C. Circuit. Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992) ("Bechtel I") (remanding comparative hearing case to FCC to justify continued reliance on "integration" criteria, given: (i)lack of empirical evidence that public interest is better served when stations are run by owner managers than by professional managers; (ii)FCC's exemption of passive, absentee owners who may own up to 99% of proposed station from calculation of integration credit; and (iii)FCC's policy allowing station licenses to be transferred after one year, thus potentially rendering impermanent any ownership-management integration on which FCC may have relied in selecting licensee); Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) ("Bechtel II") (again remanding case to FCC to explain why agency credits applicants who propose to integrate ownership into management in its

comparative "public interest" analysis, given impermanence of ownership-management integration). Rejecting the FCC's defense of its comparative "public interest" analysis in Bechtel II, the D.C. Circuit observed: "Reading the record in this case, and in a range of other cases, we are bound to say that only the [FCC's] lamentations about undue subjectivity have the ring of truth." 10 F.3d at 886.

Given the vague and amorphous "public interest" standard, it is also not surprising that the FCC has frequently awarded or denied broadcast licenses with the aim of either suppressing or favoring particular viewpoints. See, e.g., Schwartz, The Professor and the Commissions, supra, at 106 (During Eisenhower administration, FCC awarded TV licenses to eight Republican newspapers while denying TV licenses to 10 Democratic newspapers); L. Powe, American Broadcasting and the First Amendment 79-80 (1987) (describing how FCC awarded Lady Bird Johnson the only VHF TV station license for Austin, Texas); Ray, supra, at 33 (describing President Roosevelt's 1935 telephone call to FCC Chairman Anning S. Prall directing Prall to have FCC award broadcast radio station license to "my old friend Elzey Roberts," president of the St. Louis Star-Times, who was in President Roosevelt's office during call); id. at 34-35 (describing how President Roosevelt pressured FRC to reverse hearing examiner's decision in favor of New Orleans radio station in order to eliminate potential rival Senator Huey P. Long's radio forum); id. at 46-47 (describing how FCC awarded license for VHF TV station previously allotted to Petersburg, Virginia to staunch Republican supporter even though the applicant intended to operate station in Richmond, not Petersburg). In short, the licensing of broadcast stations under the "public interest" standard "carries the potential to be used politically, and the temptation to do so [has been] irresistible." Powe, supra, at 84 (commenting on the FCC's award of TV station licenses in the 1950's).

To be sure, in rejecting a First Amendment challenge to the FCC's "Chain Broadcasting" regulations more than 50 years ago, the Supreme Court in NBC v. United States expressly approved the FCC's reliance on the "public interest" standard in making broadcast licensing decisions, stating that the FCC's "[d]enial of a station license on that ground, if valid under the Act, is not a denial of free speech." NBC v. United States, 319 U.S. at 227, 63 S. Ct. at 1014. The NBC Court, however, was not presented with any First Amendment claims based upon the public forum doctrine, such as plaintiffs pose here. Nor did it have before it the long record of viewpoint-based and capricious licensing decisions made by the FCC under its "public interest" standard which now exists.

Indeed, in upholding the FCC's authority to award and deny broadcast licenses under the "public interest" standard in NBC v. United States, the Court, through Justice Frankfurter, pointedly observed that:

Congress did not authorize the [FCC] to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the [FCC] by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different.

Id. at 226, 63 S. Ct. at 1014 (emphasis added). In light of the many instances over the years in which the FCC has awarded broadcast licenses precisely on those prohibited bases, it is time to take a second look at the "public interest" standard under current First Amendment standards.

4. The broadcast licensing scheme impermissibly allows one class of speakers to monopolize the electronic public forum for radio broadcasting.

"In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers . . . When speakers . . . are similarly situated, the State may not pick and choose." Perry, 460 U.S. at 55, 103 S. Ct. at 960. Insofar as the broadcast licensing scheme authorizes the FCC to grant broadcast licenses to use exclusively assigned frequencies (either in a given region or on a nationwide basis) to a relatively few broadcast radio stations, which are collectively owned by even fewer media companies, it impermissibly allows a select group of favored speakers to monopolize and therefore limit speech in the electronic public forum dedicated to radio broadcasting.

To be sure, licensed broadcast radio stations, in theory, serve as "'public trustees,'" CBS v. DNC, 412 U.S. at 111, 93 S. Ct. at 2091, "with obligations to present those views and voices which are representative of their communit[ies]," Red Lion, 395 U.S. at 389, 89 S. Ct. at 1806. That does not, however, remove the constitutional infirmity. "'It hardly answers one person's objection to a restriction on his speech that another person, outside his control may speak for him.'" Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S. Ct. 1722, 1728 (1987) (quoting Regan v. Taxation With Representation of Washington, 461 U.S. 540, 553, 103 S. Ct. 1997, 2005 (1983) (Blackmun, J., concurring)); see also Virginia State Bd. of Pharmacy, 425 U.S. at 757 n.15, 96 S. Ct. at 1823 n.15 ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means.").

Moreover, as former FCC Chairman Reed E. Hundt has recently observed, "[t]he FCC essentially dismantled the public interest standard in the early 1980s by conflating the public interest' with anything sponsors will support," Hundt, supra, 45 Duke L.J. at 1094 (1996), eliminating most of broadcasters' public trustee obligations, including the Fairness Doctrine, which had required broadcasters to air contrasting viewpoints on

controversial issues of public importance to the community. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

B. Plaintiffs Are Likely to Succeed on Their Other First Amendment Challenges to the Licensing Scheme for FM Radio Stations

Even apart from public forum analysis, the broadcast licensing scheme, on its face, violates plaintiffs' First Amendment rights: first, by imposing a restriction on broadcast speech that is substantially greater than necessary to accomplish the government interests in preventing signal interference and ensuring public safety; and, second, by conferring unbridled discretion on the FCC to decide who may and may not engage in radio broadcasting, and under what conditions.

1. The broadcast licensing scheme burdens substantially more speech than necessary to achieve the government's interests even absent public forum analysis.

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 433, 83 S. Ct. 328, 338 (1963). To maintain the necessary room for citizens to exercise these freedoms, the Supreme Court has repeatedly made clear that the First Amendment will not tolerate a law which does not aim specifically at evils within the permissible area of government control, but rather sweeps within its ambit other activities that constitute an exercise of protected expressive rights. Any such law "offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and therefore invade the area of protected freedoms.'" Zwickler v. Koota, 389 U.S. 241, 250, 88 S. Ct. 391, 396 (1967) (quoting NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 307, 84 S. Ct. 1302, 1314 (1964)).

This constitutional principle fully applies to laws regulating broadcast speech. In keeping with this principle, the Court has stated that restrictions upon the First Amendment freedoms of broadcasters will be upheld "only when . . . the restriction is narrowly tailored to further a substantial governmental interest." FCC v. League of Women Voters of California, 468 U.S. 364, 380, 104 S. Ct. 3106, 3118 (1984).

The broadcast licensing scheme, and in particular, Section 301 of the Act, requiring all broadcasters to be licensed, suffers from precisely the same deficiencies as those identified as problematical in League of Women Voters. On its face, Section 301 covers the universe of expressive activity that may be aired by stations broadcasting over the available radio spectrum, subsuming "within its grip a potentially infinite variety of speech." League of Women Voters, 468 U.S. at 393, 104 S. Ct. at 3124. Like the statute at issue in League of Women Voters, 468 U.S. at 383, 104 S. Ct. at 3119, the mechanism by which the broadcast licensing scheme is enforced specifically calls for the FCC's review of an applicant's speech (the program content scheduled to be broadcast) in order to ascertain whether the grant of a license to the particular broadcaster would serve "the public interest." 47 U.S.C. Section 307(a). Such a mechanism undeniably functions in a manner that permits the agency to control the content of what is broadcast, and therefore clashes directly with "the First Amendment's hostility to content-based regulation." League of Women Voters, 468 U.S. at 382, 104 S. Ct. at 3118-19 (quoting Consolidated Edison Co. v. Public Service Commission of New York, 447 U.S. 530, 537, 100 S. Ct. 2326, 2333 (1980)).

Second, as in League of Women Voters, the governmental interests asserted as justification for the content-based statutory scheme, when viewed in light of the overall regulatory structure, do not support the imposition of so broad an encroachment on core protected First Amendment interests.

As parties from all perspectives agree, including the FCC, and the Supreme Court, see League of Women Voters, 468 U.S. at 375, 104 S. Ct. at 3110, the spectrum scarcity rationale is obsolete given technological developments that have occurred since the doctrine was first articulated. See Ray Aff. ¶¶ 3-8. At one time, the scarcity rationale may have been viewed as a reasonable and sufficient justification for the broad scope of the regulatory scheme; however, with the universal criticism of this doctrine, the conclusion is inescapable that the scheme's infringement upon First Amendment freedoms is no longer supportable under such a rationale. The constitutional flaw here is "not simply that [the scheme] includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise." Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 965-66, 104 S. Ct. 2839, 2849, 104 S. Ct. 2839, 2851-52 (1984).

In fact, the government's interest in addressing the problem of radio broadcast interference is already secured, to the extent technologically feasible, by a variety of other regulatory means that intrude far less drastically upon the First Amendment freedoms of broadcasters. See League of Women Voters, 468 U.S. at 396, 104 S. Ct. at 3126; Columbia Broadcasting Sys., Inc., 412 U.S. at 110, 93 S. Ct. at 2090. For example, the FCC has promulgated extensive operating rules for broadcasters that are intended to address the specific problems of overlapping contours and broadcast interference. See 47 C.F.R. §§ 73.1 et seq.

An examination of the fit between these stated objectives and the scope of the regulatory framework reveals that the regulations at issue are neither narrowly tailored nor sufficiently pressing given extant regulations expressly crafted to address these problems--to warrant the statute's broad suppression of broadcasters' First Amendment rights. In an effort to address very specific technological issues, the current licensing scheme has too wide a net which impermissibly restrains an immeasurable amount of expressive activity. The decisional authority makes clear that, where the asserted legislative or administrative purpose is a legitimate, or even substantial, governmental interest, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488, 81 S. Ct. 247, 252 (1960) (footnotes omitted); see also Schneider v. State of New Jersey, 308 U.S. 147, 161, 165 (1939); NAACP v. Alabama, 377 U.S. 288, 307-08, 84 S. Ct. 1302, 1314 (1963).

Moreover, in the present case, there can be no doubt that the FCC's articulated objectives could be achieved through significantly less speech-intrusive means than those employed in the current licensing scheme. See Martin, 319 U.S. at 148, 63 s. Ct. at 866; Schneider, 308 U.S. at 162, 60 S. Ct. at 151. For example, as noted above, each of the asserted objectives could be met by a first-come, first-serve registration system. Such a system would circumvent the dangers attendant to administrative licensing decisions, and could be designed to ensure adequate spectrum space between assigned broadcast frequencies in relevant geographic areas so as to ensure that no interference occurs.

Section 301 plainly falls within the category of statutes which, in purporting to regulate the time, place, and manner of expressive or communicative conduct, reach far beyond constitutional parameters to threaten and deter protected expression. See Grayned, 408 U.S. at 114-21, 92 S. Ct. at 2302-06; Cameron v. Johnson, 390 U.S. 611, 617-19, 88 S. Ct. 1335, 1338-91 (1968); Thornhill v. State of Alabama, 310 U.S. 88, 97, 60 S. Ct. 736, 741-42 (1940). The scope of the abridgement imposed "must be viewed in the light of less drastic means for achieving the same basic purpose." Because the regulatory scheme does not appropriately balance the need for regulation of the broadcast spectrum with broadcasters' First Amendment rights, the restrictions are not narrowly tailored to address the government's interests. The scheme is overbroad and therefore constitutionally infirm.

The law is clear that when a statute impinges on vulnerable expressive activities, and its flaws cannot be excised so as to permit only constitutional applications, it must be struck in its entirety. See, e.g., Aptheker v. Secretary of State, 378 U.S. 500, 515, 84 S. Ct. 1659, 1668-69 (1964); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 628-32, 100 S. Ct. 826, 831-34 (1980).

2. The unfettered licensing discretion conferred by the "public interest" standard works as an unlawful prior restraint on plaintiffs' free speech rights even absent public forum analysis.

"[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment] to prevent previous restraints on publication." Near v. Minnesota, 283 U.S. 697, 713, 51 S. Ct. 625, 630 (1931); accord Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 557, 96 S. Ct. 2791, 2802 (1976). A prior restraint on speech is "the most serious and the least tolerable infringement on First Amendment rights," because it imposes the "immediate and irreversible sanction" of "freezing" speech before it is expressed. Nebraska Press Ass'n, 427 U.S. at 559, 96 S. Ct. at 2803. While the prohibition stands, opportunities for speech are irretrievably lost. Cantwell v. Connecticut, 310 U.S. 296, 306, 60 S.Ct. 900, 904 (1940). For these reasons, a prior restraint on free speech thus comes before any court "with a heavy presumption against its constitutional validity." Bantam Books, Inc., 372 U.S. at 70, 83 S. Ct. at 639; accord New York Times Co. v. United States, 403 U.S. 713, 714, 91 S. Ct. 2140, 2141 (1971).

Time and again, the Supreme Court has recognized that any licensing scheme regulating expressive activity, and not simply those regulating expressive activity in public fora, can operate as an impermissible prior restraint on free speech. See, e.g., FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S. Ct. 596 (1990)(adult entertainment business licensing scheme); Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734 (1965) (film licensing scheme); Staub, 355 U.S. at 321-22, 78 S. Ct. at 281-82 (ordinance prohibiting anyone from soliciting organizational membership without license); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777 (1952) (film licensing scheme).

Just as licensing schemes regulating expressive activity in public fora may not confer unbridled discretion on any government official, City of Lakewood, 486 U.S. at 764, 108 S.Ct. at 2147, so too licensing schemes regulating other expressive activity may not "place[ ] unbridled discretion in the hands of a government official." FW/PBS, Inc., 493 U.S. at 225, 110 S. Ct. at 605. Any licensing scheme "mak[ing] the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." Staub, 355 U.S. at 322, 78 S. Ct. at 282 (declaring invalid ordinance conferring "uncontrolled discretion" on Mayor and City Council to grant or deny permit to solicit membership in organization).

Section 301 of the Act vests the FCC with the authority to issue licenses to applicants who seek to broadcast the full range of protected First Amendment speech over the electromagnetic spectrum. While the statute charges agency officials with the responsibility of deciding among competing applications for space on the spectrum, it imposes no parameters to limit their discretion in making such determinations. As a result, the licensing statute engenders the evils long associated with unbridled licensing schemes: self-censorship; arbitrary and discriminatory enforcement; and insulation from judicial review. See, e.g., Munson, 467 U.S. at 964 n.12, 104 S. Ct. at 2850-51 n.12; Freedman, 380 U.S. at 58, 85 S. Ct. at 739.

The Supreme Court has long noted that a licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech:

The power of a licensor . . . is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."

Thornhill, 310 U.S. at 97, 60 S. Ct. at 742.

The broad discretion provided the FCC is manifest in the "public interest" standard that is intended to guide agency decisionmaking with regard to both the issuance and renewal of radio broadcast licenses. 47 U.S.C. §§ 307(a), 309(a).
Plaintiffs have already shown that this standard is hopelessly vague. See Point II.A.3, supra; see also Krasnow & Goodman, 50 Fed. Comm. L.J. at 605 (documenting the varied construction and application of the standard first by the FRC, and subsequently the FCC, reflecting political changes over the period from the adoption of the standard in 1927 through the present). Just as the film licensing scheme allowing censorship of "sacrilegious" films in Burstyn v. Wilson set the New York Board of Regents "adrift upon a boundless sea amid a myriad of conflicting currents of . . . views, with no charts but those provided by the most vocal and powerful orthodoxies," 343 U.S. at 504-05, 72 S. Ct. at 782, so too the "public interest" standard under which the FCC awards broadcast licenses sets the FCC free to sway with the tides and winds of political change. See Point II.A.3, supra.

In this regard, Sections 307(a) and 309(a) of the Act violate one of the most basic tenets of First Amendment jurisprudence: that government regulations affecting speech must be drawn with clarity to avoid creating a license to censor and a chilling effect on freedom of expression. The statutory scheme suffers from both manifestations of this constitutional defect; it has both a censorial and an inhibitory effect on protected speech and expressive activities.

First, the flexibility of the "public interest" standard invests FCC officials with unbridled discretion in the exercise of their regulatory power, and concomitantly invites a particularly insidious type of self-censorship on the part of license applicants. Furthermore, two features of the broadcast licensing scheme exacerbate the problem of self-censorship. By permitting FCC decisionmakers to view the actual content of the speech to be licensed in this case, program content the statute creates the most direct threat to speech, see Freedman, 380 U.S. at 58, 85 S. Ct. at 738-39, and the most significant risk of self-censorship. See Illinois Citizens Committee for Broadcasting v. FCC, 515 F.2d 397, 407 (D.C. Cir. 1975) (noting that the "more pervasive threat" to the First Amendment freedoms of broadcasters arises as a consequence of indirect content regulations). Second, the periodic renewal requirements of the statutory scheme reinvigorate this risk with each application for license renewal. See City of Lakewood, 486 U.S. at 760, 108 S. Ct. at 2145 ("a multiple or periodic licensing requirement is sufficiently threatening to invite judicial concern."). The scheme thus clearly compels applicants for a broadcast license to design and temper their format and programming to suit the decisions and demands of those administering the scheme.

The second cardinal risk is that created by the absence of any express standards to check the licensing authority. The courts have repeatedly emphasized that the lack of narrow, objective, and definite standards to guide licensing decisions creates unacceptable risks of censorship and arbitrary and discriminatory enforcement. See FW/PBS, Inc., 493 U.S. at 227-28, 110 S. Ct. at 606. An evaluation of the FCC's interpretation and implementation of the statute clearly demonstrates that the broadcast licensing scheme suffers from these constitutional shortcomings. Under the scheme, the discretion of FCC licensing officials is not fenced in any meaningful way. See Gooding v. Wilson, 405 U.S. 525, 529, 92 S. Ct. 1103, 1109 (1972). As discussed above, the "public interest" standard essentially permits the agency licensing official to create a new standard for each application. Id. The opportunity for abuse where a statute provides for such an open-ended standard is self-evident; such conditions encourage arbitrary decisionmaking. As the Supreme Court pronounced more than thirty years ago, a resulting deterrent to protected speech is not effectively removed (and hence the constitutional infirmity is not cured) if "the contours of the regulation would have to be hammered out case-by-case and tested only by those hardy enough to risk criminal prosecution [or other sanctions] to determine the proper scope of the regulation." Dombrowski v. Pfister, 380 U.S. 479, 487, 85 S. Ct. 1116, 1121 (1965).

Finally, because license applicants submit their format and program plans to the FCC as part of the application process, the FCC necessarily passes judgment on the content of each applicant's speech. As a result,

every application creates an impermissible risk of suppression of the communication of ideas. See Taxpayers for Vincent, 466 U.S. at 798 n.15, 104 S. Ct. at 2125 n.15; Freedman, 380 U.S. at 56, 85 S. Ct. at 737.

Beyond these constitutional flaws, the absence of objective standards in the statute improperly insulates the licensing authority's decision from judicial review. See City of Lakewood, 486 U.S. at 759, 108 S. Ct. at 2145. Without standards by which to measure the FCC's action, the courts lack effective means to determine in any particular case whether the agency is discriminating against disfavored speech. See, e.g., Munson, 467 U.S. at 964 n.12, 104 S. Ct. at 2850-51; Cox v. Louisiana, 379 U.S. 549,
557, 85 S. Ct. 453, 465-66 (1965).

C. Plaintiffs Are Likely to Succeed on the Merits of Their Challenges to Defendants' Enforcement of the Act's Licensing Requirement Against Microradio Stations

1. The FCC's administrative enforcement actions against plaintiffs and other microradio stations violate Section 312 of the Act, and constitute an impermissible prior restraint on free speech.

Section 312(b) of the Act authorizes the FCC to issue a "cease and desist" order to "any person who has violated or failed to observe any rule or regulation of the [FCC] authorized by this Act." 47 U.S.C. § 312(b). Prior to issuance, however, the FCC must first serve an "order to show cause" upon that person, which shall contain a statement of the matters with respect to which the [FCC] is inquiring and shall call upon said . . . person to appear before the [FCC] at a time and place stated in the order . . . but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the [FCC] may provide in the order for a shorter period.

47 U.S.C. § 312(c). At that hearing, the FCC has both the burden of proceeding with the introduction of evidence and the burden of proof. 47 U.S.C. § 312(d). A cease and desist order is thus "proper only after hearing or waiver of the right to hearing." United States v. Southwestern Cable Co., 392 U.S. 157, 179, 88 S. Ct. 1994, 2006 (1968) (emphasis added).

The FCC's administrative enforcement actions against Steal This Radio, Radio Mutiny, and the Beat are surely tantamount to the issuance of cease and desist orders, since, in each instance, the microradio radio station involved was told to immediately cease and desist from broadcasting. See pp. 21, 24-25, supra. The mere fact that these oral and written warnings may not have been labeled "cease and desist orders" by the FCC does not preclude them from being classified as such. "[T]he label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact." Lewis-Mota v. Secretary of Labor, 449 F.2d 478, 481-82 (2d Cir. 1972).

Just as it clear that the oral and written warnings given by the FCC to Steal This Radio, Radio Mutiny, and presumably dozens of other microradio stations across the United States, were true cease and desist orders, within the meaning of Section 312(b), so too it is equally plain that the FCC issued those orders without following the statutorily mandated procedures. No order to show cause was served, no one was informed of a right to a hearing, no one was provided with the requisite thirty days notice, no FCC hearings were held, no written findings made, and no orders issued. Gudes Aff. ¶¶ 3-8; DJ Chrome Aff. ¶¶ 3-7; First Am. Compl. ¶¶ 73-75.

"[T]he rules promulgated by a federal agency, which regulate the rights and interests of others, are controlling on the agency." Montilla v. INS, 926 F.2d 162, 166 (2d Cir. 1991) (citing United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S. Ct. 499 (1954) (vacating deportation order because procedure leading to order did not conform to relevant regulations)); accord Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 422, 62 S. Ct. 1194, 1202 (1942) (agency regulations on which individuals are entitled to rely bind agency); Smith v. Resor, 406 F.2d 141, 145-46 (2d Cir. 1969). To allow an agency "with impunity [to] ignore or disregard" its own regulations "as it sees fit" offends "fundamental notions of fair play underlying the concept of due process." Montilla, 926 F.2d at 164, 167 (reaffirming continued vitality of Accardi doctrine); accord United States v. Newell, 578 F.2d 827, 834 (9th Cir. 1978) (purpose of rule is "to prevent unjust discrimination and denial of adequate notice of procedures by the agency in violation of due process."); see also K. Llewellyn, The Bramble Bush 43 (1951); Note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629, 630 (1974).

"The doctrine is particularly applicable where, as here, the agency regulation that was departed from governs 'the
rights or interests of the objecting party.'" Hickey-McAllister v. British Airways, 978 F. Supp. 133, 140 (E.D.N.Y. 1997) (quoting Montilla, 926 F.2d at 167). Codified in Section 312 of the Act, 47 U.S.C. § 312, as well as in FCC regulations, 47 C.F.R. §§ 1.89-1.91, the procedures for issuance of a cease and desist order "significantly affect[ ] plaintiff[s'] rights and interests," 978 F. Supp. at 141, entitling microradio stations such as Steal This Radio to a formal hearing before the FCC, prior to the issuance of any cease and desist orders, at which they might be able to present a defense of their microbroadcasting activities.

Finally, the FCC's administrative enforcement actions against microradio stations are analogous, and perhaps equivalent, to the system of "prior administrative restraints" condemned by the Supreme Court in Bantam Books, Inc., 372 U.S. at 70, 83 S. Ct. at 639. In that case, the practice of notifying book distributors that certain designated books and magazines were deemed objectionable for minors, invariably followed by police visitations, "in fact stopped the circulation of the listed publications ex proprio vigore," without any procedural safeguards to protect against the suppression of non-obscene books and magazines. Id. at 68-70, 83 S.Ct. at 638-39. Here too, by issuing oral and written cease and desist orders to microradio stations without holding the statutorily mandated formal hearing, the FCC has in fact caused the shutdown of many microradio stations without any procedural safeguards whatsoever to protect against the suppression of constitutionally protected broadcast speech.

2. Section 510 of the Act violates constitutional due process requirements and the constitutional prohibition against unreasonable seizures.

Section 510(a) of the Act provides, in relevant part,

that:

any electronic . . . device . . . used . . with willful and knowing intent to violate section 301 or 302, or rules prescribed by the [FCC] or rules prescribed by the [FCC] under such sections, may be seized and forfeited to the United States.

47 U.S.C. § 510(a). Section 510(b), in turn, provides, in relevant part, that:

[a]ny property subject to forfeiture to the United States under this section may be seized by the Attorney General of the United States upon process issued pursuant to the supplemental rules for certain admiralty and maritime claims by any district court of the United States having jurisdiction over the property.

47 U.S.C. § 510(b). These "in rem" procedures authorize the issuance of a warrant of seizure upon an ex parte application by the government. Fed. R. Civ. P. C, E(4). While any person whose "electronic device" is seized under Section 510(b) may thereafter petition for its return, there is no statutory right to a prompt post-seizure hearing on the matter. Both on its face and as applied by the FCC to microradio stations, Section 510 fails to comport with the First, Fourth, and Fifth Amendment standards governing seizure of expressive instrumentalities.

"[W]hile the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved." Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 63, 109 S. Ct. 916, 928 (1989)(citing Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 n.5, 99 S. Ct. 2319, 2324 n.5 (1979)). The pretrial seizure of expressive materials may be undertaken only pursuant to "rigorous procedural safeguards" that minimize the risk of prior restraint on protected expression. Fort Wayne Books, 489 U.S. at 62, 64, 109 S.Ct. at 927, 928. As already noted, "'[a]ny system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity.'" New York Times Co. v. United States, 403 U.S. 713, 714, 91 S. Ct. 2140, 2141 (1971) (quoting Bantam Books, Inc., 372 U.S. at 70, 83 S. Ct. at 639).

Thus, for example, the pretrial seizure of a "single copy" of an allegedly obscene film, pursuant to a valid search warrant, "for the bona fide purpose of preserving it as evidence in a criminal proceeding" is constitutionally permissible only if "following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party." Heller v. New York, 413 U.S. 483, 492, 93 S. Ct. 2789, 2794-95 (1973). Similarly, in A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723 (1964), the large-scale confiscations of allegedly obscene books and films can only be undertaken pursuant to a pre-seizure "procedure 'designed to focus searchingly on the question of obscenity.'" 378 U.S. at 210, 84 S. Ct. at 1726 (quoting Marcus v. Search Warrant, 367 U.S. 717, 732, 81 S. Ct. 1708, 1716 (1961)).

These same procedural protections extend to the pretrial seizure of expressive instrumentalities, see, e.g., Fort Wayne Books, 489 U.S. at 65, 109 S. Ct. at 928-29 (seizure of bookstores as well as books sold therein declared unlawful under Heller), as they should, given the historical origins of the prior restraint doctrine in the 15th and 16th century "struggle in England" against government licensing of the printing press -- the most powerful expressive instrumentality of the day. Near v. Minnesota, 283 U.S. 697, 713, 51 S.Ct. 625, 630 (1931).

The transmitters used by Steal This Radio and other microradio stations plainly qualify as expressive instrumentalities, since they facilitate, and indeed are essential to, microbroadcasting. Equally plainly, Section 510, on its face and as applied by the government to confiscate transmitters from microradio stations, lacks the "rigorous procedural safeguards" necessary to minimize the risk of prior restraint on protected expression, Fort Wayne Books, 489 U.S. at 62, 64, 109 S.Ct. at 927, 928, failing to provide a "prompt judicial determination" of the First Amendment rights of those whose expressive instrumentalities have been seized by the government pursuant to that statute. Heller v. New York, 413 U.S. at 492.

The constitution protects freedom of expression, not only through the mechanism of the outright proscription stated in the First Amendment, but also by ensuring that the freedoms included within the First Amendment's core of protection are "ringed about with adequate bulwarks," Bantam Books, Inc., 372 U.S. at 66, in the form of "special Fourth Amendment protections accorded . . . seizures of First Amendment materials." Maryland v. Macon, 472 U.S. 463, 470 (1985). At the heart of this vast and intricate constitutional construct is the policy of thwarting "the risk of prior restraint." Id. In this case, there has been an unequivocal and direct threat by the FCC that if the plaintiffs continue to broadcast, and thus exercise their rights to free speech, their transmitter and other broadcasting equipment will be seized and subject to forfeiture (and other adverse actions taken against them). See DJ Chrome Aff. ¶ 5; First Am. Compl. ¶¶ 73-75. As shown above, the issuance of such a threat by one cloaked in governmental authority establishes plaintiffs' injury, by way of prior restraint, as well as their standing to raise the threatened seizure as a violation of their First and Fourth Amendment rights. Steffel v. Thompson, 415 U.S. 452, 459, 94 S Ct. 1209 (1974) (two police warnings to accused to stop handbilling or he would be prosecuted sufficient harm to confer standing); cf. Action for Children's Television v. FCC, 827 F. Supp. 4, 13 (D.D.C. 1993) (standing would be found if plaintiffs had been threatened with forfeiture proceedings), aff'd, 59 F.3d 1249 (D.C. Cir. 1995).

Most certainly, seizure constitutes the most intrusive and overly drawn mechanism which the agency could take to silence plaintiffs. The starkness of the mechanism is highlighted by the fact that the Act itself provides an enforcement tool to address unlicenced broadcasting far less invasive of speech and expression. Section 401 of the Act establishes a procedure by which the FCC can apply for and obtain an injunction against unlicenced broadcasting. Under this provision, the alleged violator is entitled to a hearing in federal court, and is permitted an opportunity to raise pertinent defenses, including the unconstitutionality of the statute itself. Given the availability of this less intrusive process, the current preferred method of enforcement cannot meet the Fourth Amendment's reasonableness test. As the Supreme Court noted in Marcus, the more limited mechanism which provides for safeguards against censorship is constitutionally mandated:

> The differences in the procedures . . . amount to the distinction between, a limited injunctive remedy, under closely defined procedural safeguards . . . and a scheme which [operates] . . . indiscriminately because of the absence of any such safeguards.

Marcus, 367 U.S. at 734-35, 81 S. Ct. at 1717-18.

However, given the constitutional requirement that, even when some infringement of speech may be necessary in the face of a substantial governmental interest, any such infringement must be "narrowly tailored" to accomplish the articulated regulatory goals "without unnecessarily interfering with First Amendment freedoms." Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 618, 637, 100 S.Ct. 826, 836 (1980); see also Munson, 467 U.S. at 961, 104 S. Ct. at 2849. The only mechanism consonant with this mandate is an adversarial hearing prior to seizure, at which an independent, neutral magistrate is required to consider at least two issues bearing on a determination of reasonableness: (i) whether there exists a less intrusive mechanism whereby the FCC can achieve its regulatory purpose without imposing a prior restraint on plaintiffs' speech; and (ii) whether, given the agency's stated purpose in enforcing its licensing requirements--namely to prevent interference--there is a real danger of such interference. Unfortunately, Section 510 does not provide for such a hearing, and thus falls outside the parameters of the constitutionally mandated procedures; it silences first and asks questions later.

III.
PLAINTIFFS' CLAIMS PRESENT FAIR GROUNDS FOR LITIGATION AND THE BALANCE OF EQUITIES IS DECIDEDLY IN THEIR FAVOR

Plaintiffs have demonstrated "sufficiently serious questions going to the merits of [their] claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in [their] favor." Plaza Health, 878 F.2d at 580. At the very least, they have "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953). Plaintiffs have also shown that, absent interim relief, they cannot engage in expressive activities in the electronic public forum dedicated to radio broadcasting except at risk of fines, prosecution, and seizure of their expressive instrumentalities and materials.

In addition, "the risk of substantial constitutional harm" to plaintiffs clearly tips the equitable balance in their favor, outweighing the "administrative concerns" that underlie the restrictions on plaintiffs' expressive activities. Mitchell v. Cuomo, 748 F.2d 804, 808 (2d Cir. 1984). In sum, the harm that plaintiffs will suffer if their motion is denied--loss of freedom of speech, fines, prosecution, confiscation of their expressive instrumentalities and materials--"is `decidedly' greater than the harm" that defendants will suffer if the motion is granted. Buffalo Forge Co. v. Ampco-Pittsburgh Corp., 638 F.2d 568, 569 (2d Cir. 1981).

CONCLUSION

For the foregoing reasons, plaintiffs' motion for a

preliminary injunction should be granted.

Dated: July 13, 1998
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